FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 58

IN RE GEORGE ANASTAPLO,
PETITIONER.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED MARCH 18, 1960
CERTIORARI GRANTED MAY 2, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 58

IN RE GEORGE ANASTAPLO,
PETITIONER.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

INDEX

	Original	Print
Proceedings in the Supreme Court of the State of Illinois		
Order dated September 17, 1957 that Committee on Character and Fitness is to hear evidence and report evidence and conclusions to court	A	A
Letter from the Committee (Richard H. Cain) to George Anastaplo, dated September 30, 1957	B	B
Caption	1	1
Transcript of proceedings before Committee on Character and Fitness for the First Appellate Court District of Illinois sitting as Commissioners of the Supreme Court of the State of Illinois	1A	2
Hearing of February 28, 1958	1A	2
Colloquy between Commissioner Stephan and petitioner	2	3
Testimony of George Anastaplo—interrogation by Commissioner Carey	6	6
interrogation by Commissioner Bane	26	24
Letter from George Anastaplo to the Committee (Richard H. Cain), dated March 3, 1958	74a	61

RECORD PRESS, PRINTERS, NEW YORK, N. Y., SEPTEMBER 14, 1960

	Original	Print
Transcript of proceedings before Committee on Character and Fitness for the First Appellate Court District of Illinois sitting as Commissioners of the Supreme Court of the State of Illinois—Continued		
Hearing of March 21, 1958	75	68
Colloquy between Commissioners and petitioner	75	69
Testimony of George Anastaplo—interrogation by Commissioner Bane	83	75
interrogation by Commissioner Christianson	108	95
interrogation by Commissioner Rothschild	110	97
Colloquy between Commissioners and petitioner	112	99
Statement by Commissioner Stephan and colloquy with petitioner	115	101
Letter from George Anastaplo to the Committee (Richard H. Cain) dated March 27, 1958	123a	108
Hearing of April 7, 1958	124	120
Motion that the Committee now rule, etc. and rulings thereon	125	121
Colloquy	126	122
Testimony of George Anastaplo	134	128
Interrogation by Commissioner Sawyier	134	128
Commissioner Stephan	137	131
Commissioner Young	144	136
Commissioner Stephan	148	140
Commissioner Leighton	174	160
Commissioner Seiter	174	161
Commissioner Young	178	164
Hearing of April 23, 1958	184	168
Testimony of George Anastaplo	184	168
Interrogation by Commissioner Stephan	185	169
Commissioner Young	201	182
Commissioner Christianson	217	194
Commissioner Rothschild	222	198
several of the Commissioners	223	199
Hearing of May 19, 1958	231	205
Colloquy	231	206

	Original	Print
Transcript of proceedings before Committee on Character and Fitness for the First Appellate Court District of Illinois sitting as Commissioners of the Supreme Court of the State of Illinois—Continued		
Hearing of May 19, 1958—Continued		
Testimony of George Anastaplo	233	207
Interrogation by Commissioner Moses	233	207
Commissioner Young	241	213
Commissioner Stephan	241	214
several of the Commissioners	243	215
Hearing of May 26, 1958	292	256
Colloquy	292	256
Statement by Mr. Anastaplo	296	259
Balance of statement on Rockafellow case and the religious inquiries incorporated into transcript	301	263
Further statement by Mr. Anastaplo and interrogatories by the Commissioners	314	275
Closing argument and brief before the Committee on Character and Fitness, May 26, 1958 incorporated into transcript	361	314
Colloquy	419	365
Clerk's certificate (omitted in printing)	421	366
Sixteen rules of Procedure of the Committee on Character and Fitness, dated September 1, 1939	422	366
Questionnaire and Statement of Applicant, before the Character and Fitness Committee, dated October 15, 1957	425	371
Photograph of George Anastaplo	436	385
Letter from George Anastaplo to Richard H. Cain, Secretary, Committee on Character and Fitness, dated October 16, 1957	437	386
Attorney's affidavit of:	438	388
Stephen Love	438	388
William M. Trumbull	439	389
Angelo G. Geocaris	440	391
Character affidavit by:	441	392
Robert J. Coughlan	441	392
Kermit Eby	442	394
Nicholas J. Melas	443	395

	Original	Print
Transcript of proceedings before Committee on Character and Fitness for the First Appellate Court District of Illinois sitting as Commissioners of the Supreme Court of the State of Illinois—Continued		
Questionnaire and Statement of Applicant, before the Character and Fitness Committee, dated October 15, 1957—Continued		
Character reference by:	445	397
Mauriee F. X. Donohue	445	397
Edgar E. Swanson, Jr.	448	401
George McDonald	449	403
Alexander Meiklejohn	450	405
Malcolm P. Sharp	451	407
Roscoe T. Steffen	452	409
Richard M. Weaver	453	411
Yves R. Simon	455	413
Letter from George Anastaplo to the Committee (Richard H. Cain), dated November 23, 1957	456	415
Letter from George Anastaplo to The Editor, The New York Times, dated March 28, 1954	457	416
Letter from George Anastaplo to The Editor, The Chicago Daily News, dated August 5, 1952	458	417
Text of two letters from George Anastaplo to a member of the Supreme Court of Illinois. The first from Paris dated May 6, 1955 and the second from London dated July 14, 1955	460	418
Remarks by George Anastaplo prepared for presentation to the Committee on Character and Fitness at the beginning of the meeting of April 7, 1958	466	426
Excerpt from The Declaration of Independence, The First Inaugural Address of President Lincoln, etc., reflecting applicant's position with respect to the "right of Revolution"	470	432
Passages from two authors which speak to the problem of the "right of revolution," particularly with respect to the exercise of prudence and judgment relating thereto	472	434

	Original	Print
Transcript of proceedings before Committee on Character and Fitness for the First Appellate Court District of Illinois sitting as Commissioners of the Supreme Court of the State of Illinois—Continued		
Letter from George Anastaplo to the Committee (Richard H. Cain), dated April 15, 1958	474	437
Letter from the Committee (Richard H. Cain) to George Anastaplo, dated April 16, 1958	475	439
Article, Carterville (Illinois) Herald, October 1, 1954, "Supreme Court Denies Geo. Anastaplo Right to Bar"	476	439
Article, I. F. Stone's Weekly, March 7, 1955, "Salute to a Hero"	477	440
Letter from the Committee (Richard H. Cain) to George Anastaplo, dated September 16, 1958	478	441
Letter from George Anastaplo to the Committee (Richard H. Cain), dated September 23, 1958	479	442
Letter from George Anastaplo to the Committee (D. Robert Thomas), dated February 26, 1959	484	448
Letter from the Committee (D. Robert Thomas) to George Anastaplo, dated March 6, 1959	485	449
Report of the Committee on Character and Fitness for First Appellate Court District of Illinois	486	450
Majority report	487	450
Minority report	509	468
Appendix to the 1959 brief for the applicant (excerpts) filed in the Supreme Court of Illinois, April 30, 1959	512	473
Letter from George Anastaplo to the Committee (D. Robert Thomas) dated April 16, 1959	513	473
Letter from the Committee (D. Robert Thomas) to George Anastaplo, dated April 24, 1959	514	475
A Comment by Professor Malcolm Sharp, The Law School, The University of Chicago (1951)	515	475
Supplementary petition for rehearing before the Committee, June 25, 1957 and order denying	521	484
Syllabus of the Konigsberg opinion	526	491
Order of the Committee in re George Anastaplo, Applicant, dated July 2, 1957	527	492

	Original	Print
Letter from Laurence B. Berns to The Supreme Court of Illinois, dated May 31, 1959	528	493
Amici curiae brief filed in the Supreme Court of Illinois, June 11, 1959, by Harry Kalven, Jr. and Roscoe T. Steffen	531	498
Opinion, per curiam	549	511
Dissenting opinion, Bristow, J.	563	527
Dissenting opinion, Schaefer, J. and Davis, J.	581	547
Judgment	584	549
Order denying petition for rehearing	586	550
Clerk's certificate (omitted in printing)	587	550
Order allowing certiorari	588	550

[fol. A]

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

N.R. 780

IN RE GEORGE ANASTAPLO.

ORDER THAT THE COMMITTEE ON CHARACTER AND FITNESS IS TO HEAR EVIDENCE AND REPORT EVIDENCE AND CONCLUSIONS TO COURT—September 17, 1957

In 1951 the Committee on Character and Fitness for the First Appellate Court District denied the application of George Anastaplo for admission to the bar of Illinois. This Court affirmed the action of the Committee, (In re Anastaplo, 3 Ill. 2d 471.) and the Supreme Court of the United States denied certiorari. (348 U.S. 946.)

Subsequently the applicant filed with the Committee a petition for rehearing on the basis of certain decisions of the Supreme Court of the United States. The Committee denied this petition.

The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California,* 353 U.S. 252 and *Yates* v. *U.S.,* 1 L.ed. 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.

We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions.

B

[fol. B]

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

COMMITTEE ON CHARACTER AND FITNESS

[Letterhead]

September 30, 1957

Mr. George Anastaplo
6030 Ellis Avenue
Chicago 37, Illinois.

Dear Mr. Anastaplo:

Please be advised in answer to your letter of September 25 that the Committee on Character and Fitness has this date granted a rehearing in your matter and has instructed me to advise you as follows:

1. In view of the order of the Court the Committee requests that you prepare and file with the undersigned a new application containing pertinent information dating as of January 5, 1951, being the date of the last hearing of the full committee with respect to your original application.

2. That to establish for the court your present reputation that you file with the undersigned 5 new references in answer to question 13 in the questionnaire.

3. That for the same purposes mentioned in the above you furnish character affidavits by three persons residing in the jurisdiction in which you reside, which affidavits should be made by persons well acquainted with you, particularly during the last six years.

4. Affidavits by three practicing lawyers in Cook County which persons should not be included among the references referred to in question 13.

5. When the enclosed matters have been completed and submitted to the undersigned together with such other material that may have a bearing on your activities since your original application was denied, or which have a bear-

ing on your present reputation, that you may desire to have in your record, you will then be notified of the time and place of a hearing before the full committee.

In the meantime as per your request I am enclosing the following documents you requested:

a. Dissent of Edward I. Rothschild

b. Dissent of Calvin P. Sawyier.

Yours very truly,

Richard H. Cain
Secretary

RHC:mf

[fol. 1]

CAPTION

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of March in the year of our Lord, one thousand nine hundred and fifty-nine, within and for the State of Illinois.

PRESENT: JOSEPH E. DAILY, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER, JUSTICE GEORGE W. BRISTOW, JUSTICE HARRY B. HERSHEY, JUSTICE RAY I. KLINGBIEL, JUSTICE CHARLES H. DAVIS, JUSTICE BYRON O. HOUSE.

LATHAM CASTLE, ATTORNEY GENERAL.

ROBERT G. MILEY, MARSHAL.

ATTEST: MRS. EARLE BENJAMIN SEARCY, CLERK.

Be It Remembered, that, to-wit: on the 9th day of April, A.D. 1959, the same being one of the days in vacation after the Term of Court aforesaid, there was filed in the Office of the Clerk of the Supreme Court the Record of the Committee on Character and Fitness for the First Appellate Court District in a certain cause entitled in this Court:

In re:)
)
N. R. 780)
)
George Anastaplo)
)

[fol. 1A]

HEARING BEFORE COMMITTEE ON CHARACTER AND FITNESS

FIRST APPELLATE COURT DISTRICT OF ILLINOIS

SITTING AS COMMISSIONERS OF THE
SUPREME COURT OF ILLINOIS

In re: GEORGE ANASTAPLO

Proceedings: February 28, 1958

Reported by: Elsie W. Bingham

Present:

Commissioners Charles A. Bane, James P. Carey, Jr., J. R. Christianson, Richmond M. Corbett, Walter H. Moses, John M. O'Connor, Jr., Edward I. Rothschild, Calvin P. Sawyier, Len Young Smith, Edmund A. Stephan, D. Robert Thomas, Jerome S. Weiss, Horace A. Young.

*****

Richard A. Cain, Secretary.

*****

Commissioner Thomas: Mr. Anastaplo?

Mr. Anastaplo: Yes.

Commissioner Thomas: My name is Thomas. This is the hearing on your application for admission to the bar, for a certificate of character and fitness. Would you be sworn, please?

GEORGE ANASTAPLO, being first duly sworn, "Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?" in response to interrogation, stated as follows:

Commissioner Thomas: Be seated. Mr. Anastaplo, the committee has a subcommittee, who have examined your application, and the chairman of the subcommittee is Mr. Stephan. Can you hear all right?

Mr. Anastaplo: Yes, I can hear.

Commissioner Thomas: I will ask Mr. Stephan to carry [fol. 2] on from here.

NOTE: Internal references to Transcript pages refer to numbers [side folios in brackets] in original record as filed, and coincide with printed pages 2 to 313, inclusive, of this record.

Colloquy Between Commissioner Stephan and Petitioner

Commissioner Stephan: Good afternoon. Maybe you would like to pull up a little bit, would you, because—

I would like the record to show that this is a meeting of the Character and Fitness Committee for the First Appellate Court District, to conduct a hearing upon the application of George Anastaplo, for admission to the bar of this state. On June—in June of 1951, the applicant was advised by this committee, after several hearings, that on the basis of those hearings he had failed to prove such qualifications as to character and general fitness as in the opinion of the committee would justify his admission to the bar of this state. The applicant then appealed from this ruling to the Supreme Court of Illinois, which in a proceeding entitled *In re Anastaplo,* 3 Ill. 2d 471, denied the applicant's petition which sought a reversal of the committee's ruling. The applicant then took the matter to the Supreme Court of the United States which denied certiorari and stated there was not a substantial federal question if the papers were to be interpreted as an appeal. That was at 348 U.S. 946.

Following the decisions of the Supreme Court of Illinois and the Supreme Court of the United States, there were two cases decided, three cases, I would say, *Konigsberg v. State Bar of California,* the *Schware* case and the *Yates* case, which seemed to have some relevance to this issue. The applicant then applied for a rehearing to this committee, and the rehearing was denied. The applicant then requested the Supreme Court of Illinois that it order a rehearing, which it did, on September 17, 1957, and the rehearing today is in response to that order.

The procedure we are going to follow, Mr. Anastaplo, is that three of the commissioners will question you about various areas of your application, Commissioner James Carey, on my right, Commissioner Charles Bane, on his [fol. 3] right, and myself. I think I can say very earnestly that we are anxious to give you a fair and complete, expeditious hearing. To some degree, whether we are successful in that regard will depend on you. We want to

dispense, as much as we can, with argumentation or dialectics, unnecessary discussion. We have several questions to put to you, and in all frankness, I think I should tell you that some of them have been put to you before. It may be that failure to answer such questions in the light of other evidence in the record, would afford a ground for an unfavorable ruling. I think it only fair to tell you that. In accordance with the committee's practice, the burden of proof is on you to establish that you are a person of proper character and fitness for admission to the bar.

If at any time during the hearing you feel that you need the advice of counsel, you are welcome to get counsel. If you feel that your case can be more favorably and accurately put to us through the introduction of testimony by witnesses, we would be happy to entertain any such motion on your part.

In order to avoid inaccuracies in the testimony, we have a sound recording machine which will be used simultaneously with the taking of the stenographic transcript. I assume that you have no objection to that.

Mr. Anastaplo: No.

Commissioner Stephan: With these prefatory remarks the hearing will begin. If you care to smoke, smoke.

Mr. Anastaplo: May I have a glass of water?

Commissioner Stephan: You certainly may.

Mr. Anastaplo: May I ask some questions before you start, or is that out of order?

Commissioner Stephan: You may.

Mr. Anastaplo: You mentioned counsel. I intend to act as my own counsel, as I have heretofore, and I hope you [fol. 4] appreciate some of my comments will be some of those counsel might be expected to interject.

Commissioner Stephan: I didn't hear what you said.

Mr. Anastaplo: I hope you appreciate some of the comments I will make will be those of the nature that a counsel, if he were here, would also make.

You mentioned also, the transcript. May I now make arrangements for securing a transcript of this hearing as soon as possible, at my expense, and no matter how it turns out?

Commissioner Stephan: Mr. Cain, can you take care of that, please?

Mr. Cain: Yes.

Mr. Anastaplo: Thirdly, a technical problem, that is, can you give me some idea how long you intend to proceed this afternoon?

Commissioner Stephan: I think we will proceed to somewhere in the neighborhood of four o'clock, if we need that much time.

Mr. Anastaplo: I may need a break sometime later on, to look over some notes, and so forth.

Commissioner Stephan: All right. We intend to have a break at everybody's convenience.

Mr. Anastaplo: Finally—not finally, perhaps; you can interrupt me at any time, if I go too far. I should also like to know, you mentioned this was a subcommittee that you were chairman of, Mr. Thomas mentioned—Thomas, is it?

Commissioner Stephan: Yes, Mr. Thomas is chairman of the full committee.

Mr. Anastaplo: I take it the subcommittee considered my application.

Commissioner Stephan: Yes.

Mr. Anastaplo: And rejected it.

Commissioner Stephan: No—

Mr. Anastaplo: Or how?

[fol. 5] Commissioner Stephan: This is a rehearing on your application. This is a hearing of the full committee. The only function of the subcommittee is to conduct the examination, in the interests of an orderly meeting.

Mr. Anastaplo: I see.

Commissioner Stephan: But you are here before the full committee.

Mr. Anastaplo: This is the subcommittee here?

Commissioner Stephan: The subcommittee is Mr. Bane, Mr. Carey, and myself. We are simply an arm of the committee.

Mr. Anastaplo: I see. The subcommittee has not itself issued a report to the committee?

Commissioner Stephan: No.

Mr. Anastaplo: I see.

Commissioner Stephan: There has been no ruling.

Mr. Anastaplo: I should also like to know whether there is available, whether you have any further instructions or

guidance from the Court or any other agency, relating to this matter, which would be available to me.

Commissioner Stephan: I don't know of any. Does anybody?

Commissioner Thomas: Only the order, Mr. Anastaplo, the order on your application concerning the petition for rehearing. That is the final word from the Court.

Commissioner Bane: We do not consult privately with the Court on these matters.

Mr. Anastaplo: I see. I had no way of knowing.

Commissioner Carey: Have you seen a copy of the order?

Mr. Anastaplo: Yes, sir, I have a copy of the order.

Commissioner Stephan: That is all we have.

Mr. Anastaplo: Finally, with respect to your reference to the fact that certain questions, if left unanswered, might prejudice my application, I should like, when those questions come, and if they should be unanswered, that you at [fol. 6] that time point out to me that this is such a question that you referred to.

Commissioner Stephan: That is a decision we will have to make ourselves. I would certainly—

Mr. Anastaplo: I specifically request—

Commissioner Stephan: I would certainly feel that if we reached a critical phase in the testimony, where you failed to answer, we would give you some warning. If, out of inadvertence, we fail to, I shouldn't want to be prejudiced by the inadvertence, but we will do the best we can with your point.

Now if that is all, Commissioner Carey will commence the interrogation.

By Commissioner Carey:

Q. Will you give your full name and present address to the record, Mr. Anastaplo?

A. The name is George Anastaplo, and the address is 6030 Ellis Avenue, Chicago 37, Illinois.

Q. I believe you are married?

A. Yes, sir.

Q. Three children?

A. Yes, sir.

Q. Have been married since '49?

A. Yes, sir.

Q. While emphasis is indicated on your course of conduct since 1950, nevertheless there is, in my judgment, a need for reviewing some of your biographical data prior to that time, for the more complete information of some of the members of the committee who may not have been on the committee at the time you appeared in 1950, which led to the ensuing developments.

You were born in St. Louis, I believe, in November, on November 7, 1925?

A. Yes, sir.

[fol. 7] Q. You secured your elementary and secondary education in St. Louis and in Carterville, Illinois?

A. Yes, sir.

Q. I believe you graduated from Carterville High School in May, 1943?

A. That is correct.

Q. At what age?

A. Well, 1943, eighteen; seventeen; seventeen and a half.

Q. Following your graduation from high school, what did you next do?

A. I went to the University of Illinois for three months, at which time I took a number of courses, largely with a view to enlisting in the Air Force.

Q. And after your three months' sojourn at the University of Illinois—that was at Champaign, was it?

A. Yes, sir.

Q. Did you enlist in the Air Force?

A. That is correct.

Q. And what rank did you attain during your service in the Air Force?

A. Second lieutenant.

Q. You were in the service with the United States Air Force, how long?

A. A little over three years, I think about thirty-eight months.

Q. During your service, where did you serve?

A. In addition to service in this country, do you mean?

Q. Anywhere.

A. I served in this country, perhaps a dozen air bases, and then I had service in the Pacific, operating out of Guam,

bringing B-29's back to the United States, and then subse-
[fol. 8] quently in the European Theater, serving in France, serving out of Paris, Cairo, Dhahran, Saudi Arabia.

Q. You were a navigator, I believe, during your service in the Air Force?

A. Yes, sir.

Q. Were you honorably discharged from the service?

A. I was not discharged.

Q. Terminated?

A. I was moved into inactive—into the reserve.

Q. Are you still in the reserve?

A. No, I am not.

Q. Did you resign from the reserve?

A. I resigned at the time when certain new commitments were being arranged for the reserve, some years ago, and I didn't think I should continue.

Q. You resigned because you felt these new changes would affect your status, so you didn't want to be bound to some continued service in the future, or what was it?

A. Not necessarily, simply that these were not along the lines that I would be active in, even if there were any need for me, especially since my training was in an entirely different area. I felt also, in any subsequent service, my subsequent training, since service in the Air Force, would probably qualify me for something else, and that the age problem applying had pretty well taken care of the situation.

Q. So that you are no longer connected with the Reserve Corps in any way?

A. That is true.

Q. Now during your service in the Air Corps, was your record clear, or did you have any difficulty?

A. There was nothing in the record unfavorable.

[fol. 9] Q. No charges ever leveled against you during your service?

A. No.

Q. Then you came out of the service some time, I believe, in '47, did you?

A. Yes, I think in February '47.

Q. And then what did you do, following that?

A. I went to school at Southern Illinois University, for six months, two quarters. Before then, I had been admitted

to the University of Chicago for the following fall term, and this was the interim schooling that I took part in. The following fall, that is in October—September of '47, I was in college at the University of Chicago.

Q. Did you receive a degree from the University of Chicago?

A. That is true.

Q. In what year?

A. In the following June.

Q. What degree did you receive?

A. The A. B.

Q. So that you were at the University of Chicago just one academic year?

A. That is right.

Q. Prior to your receipt of an A.B. degree?

A. Well, I took a double load that year.

Q. A double load?

A. Yes, sir.

Q. How do you mean?

A. You can take as many courses as you like—you could then—and I simply took a double load.

Q. So, on the basis of one academic year in Chicago, involving a double load—did you get any credit for the time you spent at the University of Illinois and Southern Illinois University?

[fol. 10] A. Not really, because—yes and no, in a way, because at that time there was a very great emphasis placed on placement examinations, and whatever you placed out of, is what you were given credit for.

Q. And then following your graduation from the University of Chicago, Liberal Arts Department, what did you do next?

A. I went to law school, University of Chicago.

Q. University of Chicago?

A. Yes, sir.

Q. How long did you remain at the law school?

A. I remained until I graduated there, in the spring of '51.

Q. And your degree?

A. J. D.

Q. Now, then, prior to your graduation in the spring of

'51, you took the bar examination, did you not, the Illinois bar examination, in the fall of 1950?

A. Yes, sir.

Q. And you successfully passed your first effort in that?

A. That is true.

Q. I believe during the time that you were in law school you were married, sometime in '49; is that right?

A. Yes, sir.

Q. Following your graduation from the law school in the spring of '51, did you have occasion to go abroad?

A. In February of '51.

Q. And you went where?

A. To Paris.

Q. And you remained there how long?

A. Remained there until, oh, it must have been August [fol. 11] or September of that year, except for relatively short trips to places such as Holland and London.

Q. What was the purpose of that trip to Paris in the spring and summer of '51?

A. Well, partly, of course, for studying. I was enrolled at the Sorbonne for a short term; and partly, I might simply call it recreation, sightseeing.

Q. Had you enrolled in the Sorbonne before you had gone to France?

A. That is true. Well, I am not certain whether I had enrolled. I had made preliminary inquiries and had received certain papers; I forget now what the arrangements were.

Q. You had planned on attending the Sorbonne before you left the States?

A. Yes, sir.

Q. Were you accompanied by your wife?

A. Yes, sir.

Q. On this trip?

A. Yes, sir.

Q. And I believe one child, then quite young, I take it?

A. Yes, sir.

Q. Two years of age, or about a year?

A. Nine months.

Q. Where did you live in Paris, and with whom?

A. We lived in two places, one a one-room apartment,

in somebody else's flat, near the Sorbonne, until another place—until a larger apartment opened up, which we moved to subsequently, a little farther away from the Sorbonne. Both of them were private parties with rentable space.

Q. In attending the Sorbonne, what courses did you pursue there?

[fol. 12] A. Studies in the French language, primarily. Some literature, and the French language.

Q. Had you done any work in French prior to the time you had gone there?

A. Not except in high school.

Q. During the time you were attending the University of Chicago, either in the arts department or in the law school, were you engaged in any outside work?

A. No, I don't believe so. I had, during the first year, some outside employment, in the sense that I was doing some note taking for one of the students, for a fee.

Q. Did you have any source of outside income during the time you attended the University of Chicago?

A. This was a source of outside income.

Q. Was that the only source you had?

A. The G. I. Bill.

Q. What?

A. The G. I. Bill. I was under it at the time.

Q. How long does that apply in your case?

A. It applied all the way through the law school.

Q. All through the law school?

A. Yes, sir.

Q. Well, when you came back from Paris, in the late summer of '51, I believe it was, did you go to Dallas?

A. That is true.

Q. You went down there to take a course in oil and gas law at Southern Methodist—

A. Yes, sir.

Q. —School of Law?

A. That's true.

Q. And that lasted three months; is that right?

[fol. 13] A. Approximately three months, perhaps a little less.

Q. Was that the extent of the course, or did you have some reason for terminating it?

A. Well, I—it was perhaps about the end of it, but I had a reason for terminating it, anyway. I am fairly certain I did not finish the term.

Q. Did you have some particular interest in the field of oil and gas law at that time?

A. One reason we were in Dallas, aside from the schooling, was the fact that my wife's parents were there, and we were visiting them, also. And there was some interest in the oil and gas industry, partly because her family was involved in it.

Q. I believe I saw something somewhere, a statement by you that you came back from Dallas primarily because you felt the need for obtaining some gainful employment that would enable you to finance your difficulties about getting admitted to the bar. Is that true?

A. That is true. Gainful employment, simply.

Q. You needed money, period?

A. That is true.

Q. Now then when you returned to Chicago, about the end of '51 or early in '52, did you obtain gainful employment?

A. That is true.

Q. Where?

A. At the Industrial Relations Center, of the University of Chicago.

Q. And what were you doing there?

A. Well, we were preparing materials to be used in training courses for management personnel in various industrial concerns.

[fol. 14] Q. Had you any previous experience in that field?

A. None at all.

Q. And you remained—was that a full time job?

A. Yes, sir, full time.

Q. Every day in the week, Monday through Friday?

A. That is true.

Q. How long did you continue in that work?

A. Except for an interruption, which included a trip abroad in 1955, I continued until August of this year.

Q. Until August of '57, last year?

A. I am sorry, '57.

Q. What was the purpose of the trip abroad in '55?

A. I had, over the first three years or so that I was working in the Industrial Relations Center, made arrangements that I could accumulate my annual leave rather than take it, and in '55, after the court decision had been handed down in my case, that is the court decision in Washington, I decided that was a good breaking point and that at that time I would take the leave and use the money to travel abroad.

Q. That was just a vacation trip?

A. Yes, sir.

Q. And you took your wife and three children along with you at that time?

A. Two.

Q. You didn't have three then?

A. That is right.

Q. Now, commencing about January of '57, you did some other work in addition to your research work at the Industrial Relations Center, didn't you?

A. That is true.

[fol. 15] Q. What was that?

A. I began in January to teach in what is known as the Basic Program of Liberal Education for Adults, at the University College of the University of Chicago.

Q. That is at the Downtown Branch, at 19 LaSalle?

A. That is right.

Q. Right?

A. Yes.

Q. And have you been devoting your activity fully to that activity, during working hours, since?

A. No, I have been devoting half time to that and half time to an administrative post in the University College.

Q. You terminated your connection with the Industrial Relations Center?

A. Yes, sir.

Q. So that all of your activities, your working activities, are now related to the University College?

A. Yes, sir.

Q. Either as a lecturer, or in some administrative—

A. Teacher.

Q. Or in some administrative capacity?

A. Yes, sir.

Q. That is true today; is that right?

A. That is true today.

Q. I believe commencing in October 1955, you took on some additional activity in connection with the Committee on Social Thought at the University of Chicago; is that right?

A. That is correct.

Q. What is the function of that committee?

A. The committee is an inter-disciplinary committee, [fol. 16] that is, it is made up of people from various parts of the University, brought together outside of the departmental location, shall we say. I hesitate to say much about it; it is very hard to describe it. It seems to be one where a community of scholars in various disciplines can be brought together to investigate problems of mutual concern to them.

Q. Does it lead to any particular degree of any kind, ultimately, for the individuals who participate?

A. The students can come in and become students under this committee, under the faculty of this committee, and they can secure either a master's or a doctor's, Ph. D. degree.

Q. Is that your purpose in pursuing that work with that committee?

A. That is true; the latter degree is what I'm after.

Q. You are interested in a Ph. D. degree, and you are leading toward that end; is that right?

A. That is correct.

Q. And that is your connection with the work with the committee?

A. That is true.

Q. And I believe—have you already prepared and presented your thesis?

A. I am now preparing it.

Q. You are working on it now?

A. Yes, sir.

Q. And the subject of that thesis is, "The Historical and Philosophical Background of the First Amendment to the Federal Constitution"?

A. That is the subject. The title now is, tentatively,

"Notes on the First Amendment to the Constitution of the United States of America."

[fol. 17] Q. In addition to these other activities, I believe you were awarded some business fellowship by the Foundation for Economic Education?

A. That is correct.

Q. When was that?

A. The summer of 1956.

Q. What did you have to do to achieve that award? Or what did you do?

A. This can be a very embarrassing question. I simply applied for it.

Q. Well, that's a good way to get it. And you were successful in your application?

A. I was successful in my application.

Q. And that involved your getting a six months' trip to New York to pursue some study in connection with management problems of the Socony Mobil Oil Company; is that right?

A. Six weeks.

Q. Six weeks. Did I say six months? I take it that was a six months' trip to New York, with expenses paid; right?

A. Six weeks' trip.

Q. Six weeks. I will say six months. Do you intend to practice law in the event you are successful in your application for admission?

A. I intend to practice some law, or do some practicing of law, I should say.

Q. And where? What is your present intention—to locate and pursue the practice, in Illinois?

A. In Illinois, probably Chicago.

Q. You have lived in Chicago continuously since 1952, I believe, excepting for those two trips out of the country that you have referred to, and the six weeks' visit to New York?

[fol. 18] A. That is true. Since, perhaps you would say since '47, except for the two trips out of the country and the three weeks—three months in Dallas.

Q. I believe your father is deceased.

A. That is correct.

Q. Your mother is still living?

A. That is true.

Q. And she resides in Carterville, Illinois. Is that true?

A. That is true.

Q. Tell me, do you—are you affiliated with any church organization of any kind?

A. I am afraid that is an improper question, sir. I cannot answer.

Q. You don't care to answer the question?

A. That is true.

Q. You decline to answer it?

A. I mean, I feel I can present constitutional arguments.

Q. We will leave that. We will pass that for the moment. Does Mrs. Anastaplo participate in any activity in connection with the University of Chicago affairs?

A. No; she is simply a housewife.

Q. Simply a housewife?

A. Well, she attends lectures, and things like that.

Q. With three young children to look after, I think you said?

A. That is true.

Q. Is she engaged in any charitable, social, cultural, civic activities, in your neighborhood, or in the city?

A. Nothing to speak of, no, sir.

Q. Other than what you have described, Mr. Anastaplo, [fol. 19] since 1950, have you pursued any legal studies of any kind, or participated in any activities centering around the study of development of the law?

A. Well, from 1951, when I finished law school, until '55, of course, there were studies in connection with the litigation, but I take it that is not what you mean—simply that I have engaged in the studies in connection with my dissertation, which have been in large part legal studies.

Q. Well, have you continued any independent study of legal subjects outside of that rather broad experience you gained in your own litigation?

A. Well, the present dissertation is itself, I can give you an example, I spent a good deal of last—it must have been last summer, reading Mr. Crosskey's book very carefully, on constitutional law, proceeding later on to Blackstone's four volumes, studies like that, that covered the whole field of law, in the months I was pursuing them.

Q. I believe you have written some articles which have appeared in publications of the National Lawyers Guild. I think you mentioned those in some of your documents, did you not?

A. There are two book reviews that appeared in the Lawyers Guild Review.

Q. Would you say those fell within the field of legal research?

A. One had to do with the problem of legal ethics. The other was a review of a study or a survey of the legal profession that is in process right now.

Q. When you were in the military service were you disciplined for any reason at any time?

A. Not that I know of, except such things as company [fol. 20] punishment, not company punishment, but those gigs that we used to have, you know, for shoe shines and beds, and things like that.

Q. Keep your mess kit clean, and all that sort of thing?

A. Yes, sir.

Q. Since your last appearance before the committee, in '50, have you been involved in any legal proceedings other than the one you talked about?

A. Not—you might say indirectly that I am involved as a—what we would call an heir; that is I have had to be involved to sign papers in connection with the administration of my father's estate.

Q. Have you had any violations of the motor vehicle laws in the last seven or eight years?

A. There are two that I have been involved in.

Q. That is since 1950?

A. Since 1950, yes, sir.

Q. Are you indebted to anybody for money borrowed or otherwise, right now?

A. No, sir, I am not.

Q. Any unsatisfied judgments outstanding against you?

A. No, sir.

Q. Did you at any time participate in a students' strike or demonstration at the University of Chicago?

A. I am not certain that this is a proper question, but with the view to keeping the record as uncluttered as possible, and not to throw in issues which might divert us from the main ones, both here and elsewhere—

Q. Well, the main issue, if I may suggest it to you, is, your character and fitness to practice law.

A. That's true. I mean—I could stop and ask what kind of activities you are concerned with, and so forth.

[fol. 21] Q. What kind of what?

A. About the demonstration and strike. The demonstration and strike may have political connotations and as such would be, I would think, improper, possibly improper for inquiry, but all I am saying is, I will simply waive those considerations at the moment and say, as far as I know of, I have not been engaged in such strike demonstrations.

Q. Was there some newspaper publicity attending some group activity of the students of the University of Chicago, back a number of years ago, let's say, I am not sure about my dates, but I think about eight or nine years ago, at the time you were there as a student, in connection with a movement to obtain a change in the curriculum, or something of that kind? Do you have any recollection of that?

A. There was a protest by certain students back in '53 or '4, perhaps, when the new curriculum was being proposed, that is true.

Q. Now, then, did you take part in any way in that activity?

A. I believe that several students, in fact I know several students and I wrote a letter to The Maroon, which is a student publication, stating something to the effect that there was much to be praised in the old curriculum but it was certainly up for examination—I mean, I remember now, that was the tenor of it. That, I remember, was also the extent of my participation.

Q. You wrote one of the letters to The Maroon?

A. No, no, there were several who wrote letters. I could supply the Committee the letter.

Q. Well, were you one of those who wrote such a letter?

[fol. 22] A. That is true.

Q. Beyond that, did you take any part in the activity pertaining to that subject?

A. No, sir.

Q. Do you recall any newspaper publicity of you and your daughter, or your daughter alone?

A. There was certainly one of my daughter.

Q. Was she identified by name?

A. May well have been. I am sure she was identified in the caption of the photograph.

Q. How old was she at that time?

A. Oh, I don't know. Three or four years old.

Q. And do you recall the picture showed her wearing a placard or a card suspended from her neck, bearing some sort of a legend?

A. I most certainly do.

Q. And did you have anything to do with furnishing the card?

A. I had nothing to do with it and the first I saw of it was in the newspapers. Well, I may have been there a few minutes after it was done. But—

Q. Did you have anything to do with the organization of that particular activity that day?

A. I just happened upon it after it was all over. My wife had gone over with my daughter to watch the proceedings, and someone thought it would be very nice to hang a placard on the back of the child and some photographer thought it would be very nice to take a picture of it and some editor thought it would be very nice to have it published, and that is all I know about it.

Q. And where did this take place?

[fol. 23] A. On the campus of the university.

Q. Was it directed to some particular residence or to some particular individual in the university?

A. The demonstration, you mean? The demonstration was probably directed to the chancellor and the senate of the faculty.

Q. Did I understand you to say you arrived on the scene before it was over?

A. I arrived at the scene as the thing was probably concluding; I was working that day, I remember.

Q. About how many people were in the group, would you say?

A. The campus demonstration?

Q. Yes.

A. I have no way—I got there when it was breaking up. There may have been several hundred. I can very easily supply you with all the information you want.

Q. You had no previous connection with the organization of the demonstration?

A. No, sir.

Q. And you, yourself, did not actively participate in the demonstration?

A. That is true.

Q. Did you ask your wife how your daughter got into it?

A. It really didn't concern me much, simply because it was not—it was a matter of rather inconsequential importance.

Q. Were there any subsequent developments growing out of that activity, so far as you were concerned?

A. No, sir; except I got a copy of the picture from the publisher.

Q. Do you still have it?

[fol. 24] A. I believe so.

Q. Somewhere I have seen your notation or statement, Mr. Anastaplo, about these articles you had written; I can't put my finger on it, but would you, just in the interest of perhaps expediting the proceedings, tell us what were those articles you have written and had published, or that were published?

A. Those book reviews, do you mean, sir?

Q. Yes; or were there any other articles, whatever you have written in the last ten years or so, which have been published.

A. I think there were two book reviews, all I can recall at the moment. Do you care for citations to them?

Q. Well, tell us what they were about, and where they appeared.

A. They appeared in the Lawyers Guild Review for—I believe it's for the Fall 1954 issue and for the Winter '54-'55 issues.

Q. I have that here, now, I see. One was a review of Blaustein and Porter, "The American Lawyer." Is that right?

A. That is true.

Q. That appeared in 14 Lawyers Guild Review, 178, in the winter of '54.

A. That is true.

Q. The other was review of Drinker on Legal Ethics,

which was published in 14 Lawyers Guild Review 144, in the fall of '54.

A. Yes, sir.

Q. Have you written any other articles or discussions or reviews, or anything of the kind, which have been published?

A. Not that I now remember.

Q. Well, if you had written any and they were published, [fol. 25] would you remember them?

A. I think very likely I would.

Q. Now, during the past seven or eight years, have you engaged in any civic activities in the community in which you live, at any time?

A. Yes, sir.

Q. Would you care to tell the committee what those were?

A. Since 1956, I have been judge of elections in my precinct.

Q. Anything else?

A. Not that I now recall.

Q. That's all you remember?

A. That is all I remember at the moment, yes, sir.

Q. Just—in connection with your work as a teacher and administrative functionary at the Downtown College, just what is the nature of the work you are doing over there?

A. As administrator, it is to aid in the administration of a research project, on University College itself. That is, a study of University College, what it does, its problems, its successes, its failures, and its purposes.

Q. Now, in teaching, what subjects are you teaching?

A. In teaching, I am involved as an instructor in a four-year curriculum, made up for the most part, not entirely, of what are called the Great Books of Western Civilization. That is to say, we will spend two or three weeks on a particular book and go on to another one. And my purpose is to lead the discussions and to prepare the material so as to be able to lead the discussion.

Q. Are those evening classes?

A. For the most part. All the ones I teach are evening classes, it so happens, but we do have some daytime classes [fol. 26] in the same program.

Commissioner Carey: I think I will rest there for a moment.

Commissioner Stephan: Commissioner Bane will proceed with some questions that he has for the applicant.

By Commissioner Bane:

Q. You have been testifying now for about forty-five minutes. Do you want to have a recess?

A. No, thank you, I think not.

Q. You referred to the fact that in your precinct you have been a judge of elections, since 1956; is that correct?

A. I believe that is '56, yes, sir.

Q. And you have so stated that fact, had you not, in responding to Question 16(e) on the application, which asks whether you had ever served as judge or clerk of elections, and if so, state when and where?

Did you nod your head?

A. That is true, yes, sir.

Q. I have noticed that you do nod now and then, or shake your head. Of course you realize that neither the stenographic transcript nor the recorder would pick up that action.

A. That is true.

Q. So if you don't mind using words.

A. Yes, sir.

Q. What was the process by which you became a judge of election?

A. A truly democratic process.

Q. Democratic with a small "d"?

A. Small "d". I was walking down the street, a friend of mine driving by, desperate for a judge, says, "Listen, there he is, a friend of mine, let's ask him." They asked me. [fol. 27] Q. Let's be a little specific. Who was driving by, and who were "they"—

A. Two people were driving by, two people.

Q. Will you give us their names?

A. I don't really even recall their names now. I shouldn't call them friends, they were people who knew me by sight. Let's see. The woman who was involved was the wife of the head of a house in a dormitory across the street from where I lived.

Q. Where were you living at the time?

A. The same place I am living now. And—

Q. Who was the other person?

A. And somebody was with her.

Q. Well, it doesn't matter. Try to identify it, if you would, as to time. Was it election day, itself, or primary day?

A. I believe it was election day.

Q. And then what happened after they caught sight of you?

A. They asked me whether I would be willing to serve, and I said that I would. That is all there was to it.

Q. Did you ask what was involved?

A. Simply that they told me where it would be, and told me that I was going to be paid for it, they told me what the hours would be, and very little about what the duties would be, and then I agreed that I would be available and I showed up at the election voting place.

Q. You did in fact serve on election day?

A. Yes, sir.

Q. What election day was it, do you recall, and do you have any general idea what offices were being voted upon?

A. I could find out.

Q. Do you have any recollection as to whether it was [fol. 28] a municipal election, or whether there were county offices or state offices or federal offices, or what?

A. Since I have served in some since, I am not so sure, and the thing is, it probably was early in the year, because I believe there was a canvassing involved two days afterwards. So some of you, more familiar with the details of these things than I am, perhaps can identify it as well as I can.

Q. Let me ask you this. This was in the year 1957, or the year 1956?

A. Nineteen fifty-six, my recollection.

Commissioner Thomas: We have come to the end of the recorder there.

Commissioner Stephan: We will have a five minute recess.

[A recess was had.]

[fol. 29] By Commissioner Bane:

Q. At the time of your initial appointment as a judge of election, which, just prior to the recess, you had testified took place in 1956, at that time or thereafter, did you make any check of the Illinois statutes, to determine what the legal obligations of a judge were—obligations and responsibilities?

A. No, sir, I did not.

Q. Have you at any time since made such a check?

A. No, sir. I was broken in, as I imagine most of them were, by precinct captains and fellow judges and reading instructions that were given to us by the County Court, I think it was. I received this morning my commission for the following election and the book of instructions, which I will be studying for that purpose.

Q. Are you familiar with the fact that under the statutes in a city such as Chicago, a judge of election, any given judge of election, is affiliated with a political party?

A. I know something about that, yes, sir.

Q. Well, what do you know?

A. I know—the reason I say "something" about it is that I have been, on occasion, asked by both Republican and Democratic precinct captains in the area, and have served for each of them, subsequently. They come to me—

Q. Do you mean by that answer that you have served in your precinct as a Democratic Party judge of election and as a Republican Party judge of election?

A. That is true, sir.

Q. With which party do you now consider yourself to be affiliated in your capacity as a judge of election?

A. I really don't know.

Q. Are you serious?

A. I am serious, sir, simply because—I think the last [fol. 30] time, the Democratic one decided he needed a man, but I would not swear to it.

Q. Well, at the time that the Democratic captain decided that he did need you, didn't you have to sign a statement or make a statement that you were willing to be considered as a judge of election affiliated with the Democratic Party?

A. There was nothing said about affiliation, as far as I remember it.

Q. Well, in connection with your duties and your appointments as a judge of election, have you ever declared yourself as a member of one political party or another?

A. I have indicated *pro forma* service for both of them.

Q. And you are serious that you do not now know, even in the light of the recent commission that you have received, whether you have been appointed as a Democratic judge of election or a Republican judge of election, or as a judge of election for some other political party; is that right?

A. I'll say this. I believe this last time the man who called me was a Democrat. I believe, also, that when I filled out my commission or my application down at City Hall, I don't know how long ago, there was no indication on that what I was, or what I was supposed to be, or who I am serving for.

Q. Well, do you think that you are appropriately performing the functions of a judge of election?

A. Certainly. Do you think it makes any difference to me what party I am serving for—or if I'm serving for a party?

Q. Will you let me ask the question before you give me an answer to what you think the question is going to be? If the statute provides a scheme for judges of election whereby judges are to be appointed to be judges for, and represent political parties, do you take it into your hands [fol. 31] to decide that that is a meaningless requirement?

A. I have already said that I don't know what the statute provides or what the policy—I should add that I am not sure what the policy behind the statute is; all I know is, that I have been asked on occasion by both Republican and precinct—Republican and Democratic precinct captains, to serve, having told them, on occasion, that I had served for the preceding one last time, and they didn't seem to be bothered about it, in fact they wanted me anyway, so I served.

Q. And is it your testimony that you have not been asked, in connection with your appointments or service as a judge of election, you have not been asked to declare your political party?

A. I have been asked to check as which judge I am serving, certainly, and I have checked as which judge I am serving, and I say that is *pro forma.*

Q. Have you ever been asked to serve as a judge of election by a representative of the Socialist Party?

A. There are only two, evidently, on the ballot, on the slips, Democratic and Republican. Certainly I haven't been asked by anybody else but a Republican precinct captain or Democratic precinct captain.

Q. And would you tell us again what you believe the situation to be at the present time, whether you think you are serving as a Democratic Party judge of election, or as a Republican Party judge of election?

A. I think I was asked by the Democratic Party precinct captain; I believe I filled out a questionnaire or application that had neither one on it, I am not certain. Wait a minute—yes, I mean, come to think of it, it probably is a Democratic one; although I didn't mark it, I may have had to ask for one or the other. It may be in different colors; I don't know. I mean, I am not familiar with the [fol. 32] process of selecting precinct judges. It didn't bother me simply because I figured I would do a fair job, no matter which Party I was nominally serving.

Q. This activity as a judge of election began, as you testified, in 1956?

A. That is true. I believe it is true, because I know I served in the presidential election that year, and I am pretty certain I served in an election preceding the presidential election.

Q. I want to ask you now some questions as to what organizations, if any, you may have joined or become affiliated with, or become active in, since the denial of your previous application in 1951. You recall, do you not, that the Order of the Supreme Court of Illinois, ordering this committee to grant you a rehearing, stated that among other things, additional questions might be presented concerning the applicant's activities since his original application was denied; do you recall that?

A. Yes, sir.

Q. Now, bearing in mind that statement in the Court's Order, will you tell us whether, since 1951, the date of the

denial of your original application, will you tell us whether you have become a member of any veterans' organizations?

A. No, sir.

Q. Are you now a member of any veterans' organization, such as an Air Force Officers Association, or—

A. I probably would be considered an inactive member of the Veterans of Foreign Wars.

Q. The Veterans of Foreign Wars?

A. Yes, sir.

Q. Are you a member of The American Legion?

A. No, sir.

[fol. 33] Q. The American Veterans Committee?

A. No, sir.

Q. Since 1951, have you become a member of any alumni associations of any of the schools or universities which you have attended?

A. Not that I recall at the moment.

Q. Are you now a member of the University of Chicago Alumni Association?

A. No, sir.

Q. Have you, since 1951, become a member or become active in any civic organization active in the Chicago community?

A. No, sir; I don't believe so.

Q. Are you a member, for example, of the Chicago Council on Foreign Relations?

A. I don't believe I am a member of any of those organizations.

Q. Have you, since 1951, become a member—let me ask you first of all, you are of Greek descent, Mr. Anastaplo?

A. That is true.

Q. Your father and mother were both Greek?

A. Greek descent, yes.

Q. Since 1951, have you become a member of any nationality organization related to Greek Americans or the Greeks who were in this country?

A. No, I have not.

Q. Are you a member, for example, of Ahepa?

A. No, sir.

Q. Are you familiar with the list of organizations which

have been designated by the Attorney General as subversive?

A. I am familiar with the fact that some have been designated by the Attorney General, and I know of some that are on the list, but I am not familiar with the list [fol. 34] itself.

Q. Let me ask you, bearing in mind your Greek descent, whether you are a member of an organization which has been designated by the Attorney General as subversive, known as the American Council for a Democratic Greece?

A. I have already answered a question about nationality groups. And I have answered other questions about groups —so long as they were—so long as I could in any way tell myself this was not a question involving political activity. Now, since you seem to want to put it in those terms, I simply have to call a halt to my answering that kind of question.

Q. Well, now let me make clear that I understand, let me make clear that we of the committee understand, and that the record is clear. Why are you refusing to answer the question concerning the nationality organization which I have informed you is on the Attorney General's list of subversive organizations? Will you tell us why you do not answer the question? We would like to ask that you be reasonably brief in this response.

A. I would simply apply to this, to this question, the criteria that I have applied heretofore to other questions involving political activities and political opinions and ideas, of a kind that are not of public record.

Commissioner Stephan: Of a kind that are what?

A. That are not of public record. So long—so long as I think that these involve areas of political activities or opinions that somehow or other, for some reason or other, are suspect or are considered suspect—if you care to, I could provide you citations to previous arguments I have made at length.

By Commissioner Bane:

Q. Well, we want your statement for this record, in this [fol. 35] proceeding, as to why you are not answering that

question. We are not hampering you or hindering you in any way, but we don't want an answer by cross-reference to something else, but we want your answer today.

A. Well, fundamentally, for the purposes of this committee, I am not answering the question because of rights and privileges which I think are due to me and to others like me in the same situation, under the Constitution of the United States, the First Amendment and the Fourteenth, particularly.

Q. Are there any other parts of the Constitution which you wish to cite in addition to the First and Fourteenth Amendments?

A. I suppose I should also make reference to the *ex post facto* and bill of attainder clauses, so as to make sure there is no question about saving them.

Q. Will you now expand your answer, or let your prior answer stand, if you will, or if you so desire, in giving your reasons why you would not respond to Mr. Carey on his question concerning your church affiliations? Or, if you have changed your mind, and wish to answer Mr. Carey's question now, you may do so.

A. I think church affiliations are matters that one should be entitled to keep to himself under—and that related thereto are rights under the First and Fourteenth Amendments, which support, I think, my taking my position on that. Also, may I also add, sir, that I should like to note for the record that these inquiries—in my opinion, these inquiries are outside of the mandate of the Court. That is, I believe it is stretching it to say that "activities"—.

Q. Which court are you referring to?

A. The Supreme Court of Illinois.

[fol. 36] Q. And which mandate are you referring to?

A. The mandate of the order that was issued this summer—last summer. Furthermore, I would ask whether there is any foundation in the record for inquiries of this kind that you seem—

Q. You are phrasing it as asking questions. Will you simply make the statement and if you wish to state that in your view there is no foundation in the record for the question, then please state it that way.

A. I should also like to state that it is my opinion, based

upon what I have been able to pick up here and there, that such questions as those you seem to be about to embark upon, are not generally asked of applicants for admission to the bar, and that a foundation for the record should be even more important in that respect, and that a foundation or justification for such questions should be also required because of the nature of the inquiry itself, that is to say, into political, or in the case of Mr. Carey, religious affairs or activities, which I submit should be, if it is not, beyond the province of this committee to inquire into, for the purpose of establishing my character and fitness.

Q. Now let me ask you this. You are making this decision, are you not, to answer the question which I have asked you, making the decision not to answer the question which Mr. Carey asked you concerning church affiliations, you are making that as a personal decision; is that not correct?

A. Well, sir, I don't know what you mean by "personal."

Q. Have you been coerced, or has there been any outside force operating on you to dictate the answer—your refusal, or has it been a matter of your own decision?

[fol. 37] A. It has been my decision ever since November, 1950, my decision alone, to take the position that I am now taking, which I have taken since then, to questions of this kind.

Q. And you take that position, I assume, with the full realization, as Mr. Stephan has warned you, that your refusal to answer questions may be taken into account by this committee in determining whether you have established your fitness to become a member of the bar; is that correct?

A. That is true. At the same time, I would point out, if I may—let me add quickly, that if you do not want extended argument at this time—

Q. We do not want argument. We simply want a statement of your position.

A. If you do not want argument at this time, which is part of the position, I do not want to impose upon the committee's time. But the statement of my—the answer itself involves an argument, I believe. I believe it is safer to do it that way, but I am willing to defer to your judgment.

Q. I have no judgment on it, one way or the other. I

simply want the record to show your position, and we want you to do what you think necessary to have the record show your position on this matter.

Commissioner Stephan: May I say something, Mr. Bane?

Commissioner Bane: Of course.

Commissioner Stephan: I think the committee would feel that when we ask you a question that we tell you we attach importance to, and you refuse to answer it, we are interested in your reasons for not answering. I think there is some limit to how much argumentation we want, or can fully utilize in a hearing like this, but we certainly don't want to preclude you from stating your position.

[fol. 38] Mr. Anastaplo: Well—

Commissioner Stephan: Do you agree with that, Mr. Bane?

Commissioner Bane: Yes, I do.

By Commissioner Bane:

Q. Just to give it a little more specificity, are you refusing to answer because you have a fear that if you did answer one way or another, we might be able to check and find that you have committed perjury?

A. That is not my fear.

Q. Right. Then what is your fear, or what is your position?

A. As long as we—I mean—you all are talking now in terms of the Konigsberg decision.

Q. We are not talking in any terms except Anastaplo.

A. Let me say why I think you are talking in terms of the Konigsberg decision.

Q. Mr. Anastaplo, don't misunderstand, now. We want a statement of your position. We are not going to reargue Konigsberg, we are not going to argue anything. We want a statement of your position.

A. That is true.

Q. If we can have that, why then we can proceed.

A. All right. I mean, I have some awareness of what the law is, and you do, too, and that has something to do with the answers one makes. With reference to perjury, it is irrelevant in this situation, as is any reference to the

Fifth Amendment. I want to get that clear on the record at this time.

Q. Do you mean the privilege against self-incrimination—

A. That is right.

Q. —plays no part in your determination?

A. That is right.

[fol. 39] Q. All right.

A. My position is based on the rather extended, this committee probably thinks far too extended, exposition of arguments on this problem for several years now. That is, I do not think the problem is changed essentially, so far as my position is concerned. I have already made references to the problem of foundation, and the general practice of the committee. I would also add that this warning which has been issued is, may I submit, largely irrelevant, since the inquiry thus far is not into any problem or area that the committee has any evidence on, so far as I know, or anything that has any bearing on the case. I suspect that any answer I might make to either of these two questions would be largely irrelevant to the issue, not only in fact, but also in law, and that the constitutional arguments I have made heretofore seem to me to form a basis for refusal to answer such a question, especially when there has been no indication on the part of the committee that this is really an important area by pointing to anything other than going through a list and finding something that conforms to one's nationality.

Q. Let us proceed now, and let me ask you whether, if I had not indicated to you that the American Council for a Democratic Greece is on the Attorney General's list, and if you had not known whether it was or not, would you have been willing to answer the question as to whether you were a member of that council?

A. Probably, in the sense that I—

Q. Probably yes, you would have been willing to answer?

A. In the sense that I do not want to make it appear, and I would bend over backwards not to make it appear, that I am in any way obstructing the action of the committee, the function of the committee, or simply raising objec-

[fol. 40] tions on technical points, or even not technical

ones, when they might not be altogether appropriate. Let me say this. One can argue that some of the other questions I answered were perhaps inappropriate. One can argue that. And if one wanted to be technical, perhaps one would have to argue it. But I simply want to lean over backwards to indicate that I would like to be as cooperative with this committee as possible. And since I am really ignorant—I have already told you—I am really ignorant of most of the names on that list, you could probably name a dozen of them right now, and I could not begin to tell whether they are on the list or not—I would probably cooperate to some extent in answering some of them, if I could in good conscience say to myself I didn't know whether it was on the list. But if I know it's on the list, and I know that you are asking it off the list—I mean, this is all very vague perhaps to you—but if I know that somehow it had something to do with this kind of inquiry, the kind that I have been opposed to for seven years, then in good conscience I would have to refuse. You can take advantage of my ignorance if you like, but certainly it is ignorance, about what is on the list.

Q. Well, now, I am not taking advantage of your ignorance, as we have not done, because we have been frank with you—

A. That is true.

Q. —in indicating the organizations which are on the list. I now want to read the names or titles of certain other organizations which are on the list, according to the information that we have, and I want to ask you whether you have become a member of that organization since 1951, and in each case whether you are a member of it now.

A. May I ask first, why—does this committee care to say why they want to know?

[fol. 41] Q. No, I want to ask the question, and then I want to get your answer.

A. May I ask another question if you don't want to answer that one?

Q. Mr. Anastaplo, you are being questioned, you are the applicant; you understand that?

A. But cannot—could not counsel ask the relevance of the inquiry that is being made?

Q. I don't believe that the committee is going to permit you to put on two hats, and be a witness one minute and—

A. Cannot I ask, then, the relevance of the inquiry?

Q. I will refer the matter to the chairman of our subcommittee, but it is my view that you are the witness and that your function today is to answer questions, and not to ask them.

Do you agree, Mr. Stephan?

Commissioner Stephan: Will you state the question you were about to state, which I did not fully hear?

Mr. Anastaplo: Cannot I, when questions are asked, raise inquiries or objections of the kind that counsel would, or that a fairly intelligent and alert witness might? I really think this is a rather unusual claim on the part of Mr. Bane.

Commissioner Bane: Let me state that I think Mr. Anastaplo has just changed his position, as he originally wanted to ask questions. He now states that he wants to make the objections that a counsel would make. I take it that he has already objected sufficiently on the record to these questions. If he wishes to state, when I ask the question, that he renews his objection, which would be the orderly thing to do, then of course he can do so.

Mr. Anastaplo: I am sorry, Mr. Bane.

Commissioner Stephan: I should suppose, in answer to your question, that if you are asked a question which you [fol. 42] do not believe has relevance to the issues before us, you can decline to answer it and state the reasons for your declining. We have no way of compelling you to answer in a hearing of this type. Your failure to answer may carry certain consequences—may—I emphasize "may." But I don't think that we can engage in polemics with you, as to whether the question is a good question. You answer it or you don't answer it, and if you want to give the reasons for not answering, that is your prerogative.

Mr. Anastaplo: Then may I inform Mr. Bane before he reads his questions off of this list—state an objection—I mean a question when you restate it again is a form of objection of it—state the objection that there has been no showing or indication to me here, or by any other means, either of the developments of the question, or the validity

of the list, or any showing that the list was devised for any purpose that relates to the purpose of this inquiry?

Commissioner Stephan: Without agreeing or disagreeing with what you say, I think that the comment is proper.

Mr. Anastaplo: Thank you.

By Commissioner Bane:

Q. Let me now ask you whether you are a member of this organization, which is, according to our information, on the Attorney General's list: The Abraham Lincoln School of Chicago, Illinois?

A. I am sorry, I must decline to answer the question, for the reasons given here and elsewhere.

Q. Let me ask you now whether, during your period at Southern Methodist University, you became a member of or active in an organization which according to our information is on the Attorney General's list, the Civil Rights Congress for Texas?

[fol. 43] A. I'm sorry, I must have to take the same position.

Q. Let me ask you whether you would take the same position if I were to ask if you were a member of or active in the Council of Greek Americans?

A. Yes, I must take the same position.

Q. The Ku Klux Klan?

A. I must take the same position, and for the same reasons.

Q. The Silver Shirt Legion of America?

A. I must take the same position, for the same reasons, and again indicate, and stress even more strongly, the objection I made about foundation, relevance, the purpose of this list, and the purpose for which you are using it, and the purposes of the committee, and how it relates to this.

Q. Continuing, I will ask you whether you are a member of this organization, which we understand is on the Attorney General's list—the American Youth for Democracy?

A. I must take the same position.

Q. Let me ask you now concerning certain organizations, or concerning your present intention as to whether you

would become a member of certain organizations in the event your license to practice law were to issue to you. Let me ask you first of all whether it is your present intention to become a member of The Chicago Bar Association?

A. I would, if they would put me on the Committee on Character and Fitness.

Q. Are you under the impression that this is a committee of The Chicago Bar Association?

A. It has some relation to it, and I think it has some control over it.

Q. "It" being what? "It has some control over it," being what "it" in each case?

[fol. 44] A. The Bar Association seems to have some intimate relation with and control over the membership of the committee.

Q. The Chicago Bar Association, in your opinion—

A. In my opinion, yes.

Q. —has some measure of control over it?

A. Yes, sir.

Q. Did you answer the question as to whether you—

Commissioner Stephan: Does that decrease its usefulness, in your opinion?

Mr. Anastaplo: Excuse me?

Commissioner Stephan: Does that decrease its usefulness, in your opinion?

Mr. Anastaplo: Of what; of the Bar Association?

Commissioner Stephan: The affiliation between the two groups.

Mr. Anastaplo: I have indicated already, I think in print, even, that I think character committees serve a very useful purpose. Sometimes they go off.

By Commissioner Bane:

Q. Will you answer my question as to whether it is your present intention, in the event that your license issues—whether it is your present intention to become a member of The Chicago Bar Association?

A. I'm sorry, I really could not answer questions about what my intention is, what organizations I might join, in the event of something happening, which I cannot now plan on.

Q. What is the basis of that answer now? Is it that you simply don't have a present intention?

A. Simply ignorant of what I would do under the circumstances.

Q. You are not refusing to answer the question; is that [fol. 45] correct?

A. I'm not—I mean—let's put it this way. If I knew what I might do, then there might be some organizations that I might refuse to answer about, but since I really am talking about a very hypothetical case I know nothing about, it is simpler at this moment, and once again, to keep the record clear, to say that I simply don't know what my intention would be, or what would happen if I were a lawyer, and to let it go at that, if I may.

Q. On the same assumption, do you have a present intention as to whether you would become a member of the Illinois State Bar Association?

A. I'll have to give the same answer; I simply don't know what I would do.

Q. Do you have a present intention as to whether you would become a member of the American Bar Association?

A. I'm sorry, I simply don't know.

Q. Do you have a present intention as to whether you would become a member of the National Lawyers Guild?

A. I must say once again, I simply don't know what I would do.

Q. I take it that in none of those cases, relating to bar associations, are you refusing to answer the question; is that correct?

A. I am not refusing to answer, I am not refusing to answer because I am simply ignorant of what my intention would be. If I knew what my intention would be, I might refuse to answer, but right now I simply want to avoid bringing in extraneous issues, and simply register the fact that I am ignorant of what my intention would be, or what my intention is.

[fol. 46] Q. I want to ask you now whether, since the date of the denial of your original application in 1951, you became a member of the Communist Party of the United States?

A. I shall have to give the same answer, to refuse to

answer, and for the reasons that I have given in various documents I have heretofore prepared in the course of litigation.

Q. The question that I just asked related to the question of whether you had become a member since '51, and I would now ask you whether you are now or have ever been a member of the Communist Party of the United States.

Commissioner Stephan: We will have a five-minute recess.

[A recess was had.]

By Commissioner Bane:

Q. We want to go back several questions, in order that the tape transcript might be complete, as the stenographic transcript now is: So, Mr. Anastaplo, I would like to repeat my question and I would like to have you repeat your answer, if you would.

A. And may I change the answer, if I like?

Q. I beg pardon?

A. May I change the answer, if I like?

Q. Certainly. Bearing in mind the consequences that might come from a changed answer. This is the question which we would like to repeat: Have you, since the date of the denial of your original application in 1951, become a member of the Communist Party of the United States?

A. I should once again like to register the same objections, and to add to them, the observation which I have made before, in litigation, that this committee is asking a [fol. 47] question, the answer to which they have very little doubt about. I am prepared to testify that I have some indication that the committee has very little doubt about the answer to the question.

Q. Where did you get that indication and what do you think that this committee thinks is the answer to the question?

A. The quotation I would like to give you is, "No one ever thought you were a communist." This is not something that I'm saying, this is not a claim that I am making; I want the record to be clear on that. I am only registering what I say is a fact, which has a bearing upon the purpose

of the committee's question, upon the good faith of such questions, upon the relevance of the question, and upon the significance of a refusal to answer the question.

Q. Do I understand you to be saying that you think that the committee thinks that you are not a communist?

A. I am prepared to testify—I believe that, also, and I have thought that for a long time, as well as not being a member of the Ku Klux Klan, for instance—I should also add that I am prepared to testify that I have on very good authority, that the committee has never—that no one, I might say, no one on the committee or the Court—ever thought I was a communist. Would you care to have proof of that, sir?

Q. I would like to ask you the question of whether you have not, by what you have just said, indicated that you think that it's a relevant consideration as to whether you are a member of the Communist Party?

A. No.

Q. And I would like to ask you whether, if you do not think so, whether the simple thing for you to do is to answer the question?

A. I say it's irrelevant for the purposes of this committee.

[fol. 48] Q. Are there other arenas or other areas in which you would answer the question as to whether you are a member of the Communist Party?

A. Certainly.

Q. In what other places would you answer the question?

A. I imagine if my wife were to ask me, I would tell her. I imagine if my children were to ask me, and they were asking it in a responsible sort of way, I would tell them. I imagine if friends were asking me, for a responsible reason, I would tell them. I imagine if someone with whom I was entering a certain kind of relationship that required a very intimate knowledge of my purposes and ideas, in private life, I would be inclined to tell them that I was a member of the Communist Party, or Democratic Party or Republican Party. For instance, if Mayor Daley were to call me up and ask me to run for judge on one of his tickets, and were to consult with me and I thought it important enough for me to run for judge, I would be inclined to tell him

whether I was a Republican or a Democrat, to say nothing about whether I was a communist. Certainly there are areas in which I would discuss these matters. But this is an area that is a little bit different from that. This is an area where the power of the State is being brought to bear in making inquiries into areas which I believe are outside your province because of the Constitution of the United States.

Q. Would you explain for the record what you consider to be the distinction between a request to run for judicial office, under which circumstances, I take it, you would answer questions about your political affiliations—

A. In which I might answer questions of the sort—in which I might answer questions about political affiliations. [fol. 49] Q. Explain, if you will, for the record, the difference, in your view, between that situation and the present situation, in which you are seeking the privilege of becoming a practicing member of the bar?

A. I mentioned Mayor Daley. I assume—at least I was speaking of him in his nonofficial capacity, that is, a man with some prestige and power in the Democratic Party in the city, and if I were closely associated with him, a question such as this would be rather natural, as well as, "What is your religion," because we know how tickets are lined up, sometimes according to religious affiliations, and so forth. I mean, in matters like this, under circumstances like that, it might be appropriate. But these are essentially private matters. Not the office, I am not claiming the judge is a private office, but the relationship. And I would also add that it isn't a matter of the power of the State being brought to bear to establish a certain kind of conformity.

Q. Is there a distinction in your mind between the power of the State and the power of the Chairman of the Cook County Democratic Committee?

A. I should hope so.

Q. Do you want to elaborate on that, or does the record now satisfy you with respect to your position?

A. The distinction between the power—

Q. With respect to your position on these questions that we have been asking?

A. I once again make my offer, I could prove to you, or try to prove, on very high authority, that no one ever

thought I was a communist. That is a quotation which I believe is accurate. If this committee wants that evidence, which I think shows something about the good faith of these inquiries, the purpose of them, I am willing to proceed to establish that evidence.

[fol. 50] Q. Have you ever heard of the best evidence rule?

A. Yes, sir.

Q. What is the best evidence as to whether you are or are not a member of the Communist Party?

A. I suppose what I say.

Q. Correct. Are you willing to proffer the best evidence?

A. I am not willing to say it myself. I think that is an irrelevant consideration.

Q. All right. Will you present for the record what evidence you think you have as to what the committee's attitude is on your membership or nonmembership in the Communist Party?

A. I have a document here—

Q. Do you want to have it marked as an exhibit?

A. I wish some gentleman of this committee would mark it on the back pages before I go any further. Just initial it, if you will.

Q. Will you hand it to the chairman of the subcommittee, please?

Commissioner Stephan: Are you introducing this?

Mr. Anastaplo: If you would bear with me a few minutes. If you will just simply initial—

Commissioner Stephan: I will mark it for identification. If you are going to read from it or use it, the committee will have to see it.

Mr. Anastaplo: That's right, I will wait until that time comes and let them see it.

Commissioner Bane: Mr. Chairman, could we have the record show that the document marked by the subcommittee chairman, Mr. Stephan, was returned to Mr. Anastaplo, without Mr. Stephan's glancing at the document or becoming in any way familiar with its contents?

[fol. 51] Commissioner Stephan: I have marked it, "Anastaplo hearing, February 28, 1958, Exhibit A for identification."

Mr. Anastaplo: Now I am prepared to testify—

Commissioner Stephan: Will you wait just a moment?

Mr. Anastaplo: I'm sorry.

Commissioner Stephan: The chairman would like to make it clear, if such is the fact, that you are offering this on your own initiative.

Mr. Anastaplo: So far. Up to this point—

Commissioner Stephan: Will you just let me finish what I was going to say?

Mr. Anastaplo: I'm sorry.

Commissioner Stephan: And as an effort on your part to meet the burden of proof which falls upon you, as the applicant, to show proper character and fitness to this committee.

Mr. Anastaplo: And to speak to—and may I add, to speak to the problem of the relevance, the purpose of these questions, in these circumstances. That is to say, in this case. This document, I am prepared to testify, is extremely accurate with respect to the critical points. I have no instructions not to use this information, it came to me by chance; in fact, I have indicated to the party concerned that it might be used. He has not replied. Furthermore, to use it would be far less an invasion of privacy than what the committee has done so far. But I do not have to rely upon my judgment. The committee has claimed from time to time, that it is inquiring into matters that Illinois might not otherwise be certain about, unless I answer its questions. This document is a repudiation of that claim. You have heard the quotation. Will some member of this committee ask me who told me this, what the circumstances were, and [fol. 52] so forth? That is, will this committee, or some member thereof, ask me or instruct me to submit this document for inclusion in the record? May I finish, Mr. Chairman? It is not a privileged document. I am willing to waive any constitutional rights I might have to withhold it. It is a document relevant to this inquiry and it in effect calls into question the good faith of much that has been done with respect to me the last eight years.

I am far from certain I would have a right to refuse any request from the committee to see this document. If a request is made, I believe I would yield to your judgment

and submit this document for the record. Once it is submitted, I would consider it a public document which I can make whatever use of I judge fit. Let me add that it is my opinion that this committee should not, in the light of the standards employed by this committee with respect to me since 1950, consider this document improper to include in the record. Do I hear a request?

Commissioner Bane: Before we get into it, Mr. Chairman, let me ask the witness, have you gone as far as you intend to go in identifying the document and the nature of its contents?

Mr. Anastaplo: Let me add one more paragraph. I rely upon this document not only because of the source of the statement, which I can indicate, but also because I believe my source was accurate in his report of what was thought about my affiliations or lack of them. This statement casts light on the 1954 opinion of the Illinois Supreme Court, upon the present activity of this committee, as well as past activities of the committee, and tends to confirm what I have said many times before, about the motivation behind that opinion, about its validity, and about the committee action.

[fol. 53] Commissioner Rothschild: Mr. Chairman, may I suggest that the witness be excused?

Commissioner Stephan: We will excuse the witness until we get in touch with you. Will you wait outside, please?

Mr. Anastaplo: Certainly.

[The witness was excused and discussion was had, off the record, after which the witness was recalled.]

Commissioner Stephan: This committee feels, Mr. Anastaplo, that if you have any evidence, oral or documentary, or otherwise, that bears upon the issues before us, you have a right to proffer that evidence. We are not going to urge you or supplicate you to put anything into the record. If you put it in, you put it in on your own responsibility. Whether what you do put in is relevant to those issues, is for the committee to determine. We make no deals.

Mr. Anastaplo: Sir—I'm sorry.

Commissioner Stephan: I repeat that you have the burden of going forward here, and if you have something

to go forward with, we will be happy to see it. We leave the matter there.

Mr. Anastaplo: May the record first show, if it does not already show it, that there was a recess for the committee to consider this for a certain number of minutes, however long it was; fifteen minutes?

Commissioner Stephan: I don't know what it was, either. The record does show that there was a recess, because the chair called for a recess.

Mr. Anastaplo: I estimate it was at least fifteen minutes.

Commissioner Stephan: You can estimate anything you wish.

[fol. 54] Mr. Anastaplo: Secondly, I am not suggesting a deal. I am saying I stated a fact, a quotation, and you asked me earlier to identify it. It is a three-page typewritten photostat, the back page of one of the two sets I have, being marked by you. I claim it is relevant. I say the quotation I gave you shows it's relevant. It speaks to the honor and good faith of this committee, not only this committee but its predecessors. I don't have to be begged, supplicated, urged, or otherwise induced. All you have to do is ask me to submit it, request it, the same way you are requesting information about whether I am a communist, whether I am a member of the Ku Klux Klan, and all these other matters. I believe this is relevant, it is a document you will hear more of later, and I think it's something—

Commissioner Stephan: I don't think that comment would move us one way or another.

Mr. Anastaplo: No, you will hear more of it later—

Commissioner Bane: Is the comment that we will hear more of it later, intended to be a threat?

Mr. Anastaplo: No, simply an indication of what the state of facts are—what the state of facts is; let me correct myself. I may seem unduly harsh in some ways about this. At the same time, I want to point out to this committee that I believe this committee, not necessarily the present one, has behaved shamefully with respect to my application for seven years.

Commissioner Stephan: Well, now, let us get back to the—

Mr. Anastaplo: And I might also add that this is relevant in that it speaks to the problem of what the committee is doing.

Commissioner Stephan: Why don't you offer it in evi-
[fol. 55] dence, if you do? I am not asking you to. I don't think you can come into this hearing and tell us that you have something which, on its face, at least, sounds like it is pure hearsay, because what is said through the medium of that document is the words of someone who is not before the committee.

Mr. Anastaplo: That is true.

Commissioner Stephan: We invited you to have witnesses present if you thought they had something to tell us that bore upon your application.

Mr. Anastaplo: Let me identify it another way.

Commissioner Stephan: It seems to me, you seem to prefer the route of hearsay documents. We are not saying that we won't consider the hearsay document, because strict rules of evidence probably are not to be observed in a hearing like this, but the burden is on you and the initiative must be yours.

Mr. Anastaplo: As far as the burden, I would be prepared to argue that I had a prima facie case when I walked into this room today and nothing has happened since to change that. The burden of proof is on me, but at certain stages the burden of going forward changes. I would also add, I would identify the document one further way. This is a statement by a member of the Supreme Court of Illinois, by a man who I can assure you was in a position to know what the facts were in the case. Now, I ask you again, do you want to know what the circumstances and context of this are?

Commissioner Bane: Mr. Chairman, I would suggest that the reporter reread to the witness the statement which you made with respect to our attitude, and let him then make his decision. If he doesn't make the decision, then let us go forward with the examination.

Commissioner Stephan: Would you please read that, Miss Secretary?

[fol. 56] [The reporter read portion of proceedings as requested, as follows:

"Commissioner Stephan: This Committee feels, Mr. Anastaplo, that if you have any evidence, oral or documentary, or otherwise, that bears upon the issues before us, you have a right to proffer that evidence. We are not going to urge you or supplicate you to put anything into the record. If you put it in, you put it in on your own responsibility. Whether what you do put in is relevant to those issues, is for the committee to determine. We make no deals.

Mr. Anastaplo: Sir—I'm sorry.

Commissioner Stephan: I repeat that you have the burden of going forward here, and if you have something to go forward with, we will be happy to see it. We leave the matter there.

Mr. Anastaplo: May the record first show, if it does not already show it, that there was a recess for the committee to consider this for a certain number of minutes"—.]

Commissioner Stephan: That's far enough. I mean, the point is made.

Mr. Anastaplo: May I say anything else, sir?

Commissioner Stephan: Yes, you may.

Mr. Anastaplo: In a way, I am glad the committee has taken the action if has.

Commissioner Bane: May I suggest that the record show that there may be views as to whether the committee has taken action, or Mr. Anastaplo is guilty of inaction, at any rate we are not concurring in his conclusion that the committee has taken action.

Mr. Anastaplo: I would practically agree with Mr. Bane by saying, the action of not making the request. And I hope that perhaps for the first time, this committee realizes what I have been talking about all these years, when I have insisted that perhaps not all relevant information is proper. Therefore I will reserve for the time being, this document which has been identified, and which I have testified to under oath as accurate.

[fol. 57] Commissioner Weiss: Mr. Chairman, pardon me, I still don't know what is in that document and I don't believe any member of this committee does. Just so there will

be no misunderstanding, the references by the applicant with respect to that document should not be construed as meaning that we have ever seen the document or know its contents, or anything about it. And any implications about our having passed upon the document or knowing anything about it, should certainly be negative in this record.

Commissioner Stephan: I agree with that, Mr. Weiss.

Mr. Anastaplo: And I agree, too, that the committee has not seen the document. It is simply that the chairman of the committee has marked the last page, or what purports to be the last page of one set of this document, on the back.

Commissioner Carey: He marked the blank side of the back page.

Commissioner Stephan: If you will bring the document over here, I would like to mark each page of it.

Mr. Anastaplo: Certainly.

Commissioner Stephan: Now I don't want to see it.

Mr. Anastaplo: Here, let me, perhaps I— Shall I take it apart?

Commissioner Stephan: And it's best we restaple that, after that's done.

[The document was unstapled and Commissioner Stephan marked the back of each page thereof.]

Mr. Anastaplo: I should also add that although you have not seen it, you have been told several times, one passage, which I particularly wanted to call to your attention, quote, "No one ever thought you were a communist." I particularly want to mention this passage, in the light of the Supreme Court Appellate opinion of 1954, which said, "... the [fol. 58] crux of the controversy is centered upon petitioner's refusal to answer as to whether he was a member of the Communist Party ..." and later on, in the same opinion, "A negative answer to the question"—that is about Communist Party membership—"if accepted as true, would end the inquiry on this point."

There is a comment in Northwestern University Law Review article, which I will give to you later on, to the effect, "A reading of the opinion of the Supreme Court of Illinois conveys the impression the petitioner was probably a member of the Communist Party." And against this, I

want to submit this document, if you care to request it. I should also note, I would not have even made this suggestion except for the questions that were brought up about affiliations with the Communist Party, Ku Klux Klan, and other so-called subversive organizations.

Commissioner Carey: Does that include the question about the church organization, too?

Mr. Anastaplo: Well, perhaps to be consistent, I should say that, also. My impression is that that is not of vital concern of the committee at the moment. Otherwise, I would say more about it at the proper place.

Commissioner Stephan: Have I marked every page?

Mr. Anastaplo: There are three of three. There are two sets, three pages each.

Commissioner Stephan: Every page is marked?

Mr. Anastaplo: I will show you the pages.

[The reverse sides of the document pages were held up for viewing.]

Commissioner Stephan: Every one is marked.

Commissioner Moses: Mr. Stephan, may I suggest you read into the record what you put on the back?

Commissioner Stephan: Yes. I did it before, but I will [fol. 59] repeat. I marked each paper that was in the witness's possession on this issue, "Exhibit A for identification, Anastaplo hearing, 2/28/58."

Commissioner Thomas: And the record should be plain that the marking was done on the back of the page without any reading or examination of the front of the page, by either Mr. Stephan or any other member of the committee.

Mr. Anastaplo: I might perhaps say, as I have indicated before, that the way this is left is not altogether undesirable. At the same time, I want to indicate again, this is a document that might have some bearing later on. The reason I make this point is because of the difficulty—let me say something. Most of the members of the committee have had less experience with the Committee on Character and Fitness than I have had. Mine has been on a different side of the bench from you. But I have had a lot of trouble—

Commissioner Stephan: We are learning.

Mr. Anastaplo: Yes. I am sure you know about certain aspects much more than I do. But there are some aspects

which I am afraid I have had too much personal experience with. And one problem has been that of establishing evidence. You are on one side, I am on the other, and it is always possible to misconstrue what is said, what is done, in such a delicate matter, where one man presumes to hold out something which seems to some people to be important. And consequently I have had trouble establishing what is usually very easy to learn, or things that are fairly common, or that any man on the street, if he knows someone, far less than you have known me, if you come to think about it in terms of all the testimony that has been taken, a very hard time establishing these things.

[fol. 60] I have had a very hard time getting hold of documents. For instance, there is an investigator's report.

Commissioner Bane: I would like to have the witness specify for the record what documents he has attempted to get and with respect to which documents he has had difficulty. Let's have an end to these generalized statements.

Mr. Anastaplo: All right.

Commissioner Bane: If you have some specific statement to make, make it.

Mr. Anastaplo: Yes, sir, I am making it. There is someplace a report, either in the archives of the committee or in the minds of the committee members, a report made by an investigator, who was commissioned by the committee, as far as I know, to go to my home town, Carterville, Illinois, in 1951, on two occasions, to make various inquiries about me. He spoke to the banker, I believe, and other people. I heard about this, since it is a small town, since I was well regarded there, and some people, enough people thought well enough of me to tell me about it.

Commissioner Bane: Do you regard that as an improper activity on behalf of the committee?

Mr. Anastaplo: No, but I know what the committee turned up.

Commissioner Bane: Do you believe you are entitled to receive the investigator's report?

Mr. Anastaplo: I will say this.

Commissioner Bane: Will you answer the question? Do you think you are entitled to get the report?

Mr. Anastaplo: I am entitled to something of this kind.

Commissioner Bane: Are you making a motion for the report?

[fol. 61] Mr. Anastaplo: I would like to answer your question, if I may.

Commissioner Bane: All right.

Mr. Anastaplo: I am entitled to some indication in the record, or in the report to the committee, which I did not receive in '54, that such an investigation was made, and that it was highly favorable. Instead, that whole dimension of my life, not only there, but with respect to character affidavits and so forth, was completely left out in the Supreme Court opinion, partly because of the failure on the part of this committee to notify the Court that it had looked into this aspect of my life and found it very favorable.

Commissioner Bane: Did you request this committee to make that document available?

Mr. Anastaplo: On several occasions I asked.

Commissioner Bane: Will you furnish us with references in the transcript or what evidence you have of those requests?

Mr. Anastaplo: Perhaps Mr. Cain—do you remember my requests?

Commissioner Bane: Will you do it, Mr. Anastaplo?

Mr. Anastaplo: Certainly.

Commissioner Bane: Can we resume the examination now, or do you wish to make further statements as to documents which you have requested and not received?

Mr. Anastaplo: I would like to—

Commissioner Thomas: Will you wait just a moment, please? Commissioner Rothschild has—

Commissioner Rothschild: I would like to violate our rules of the game to interpose this thought with respect to this phantom document. Mr. Anastaplo has described this document as a document which relates to him, what was [fol. 62] related to his source, by a judge of the Supreme Court as to what this committee thought.

Mr. Anastaplo: No, sir, no, sir, I am sorry, that is not true. A document relating what a judge—a justice of the Supreme Court told me.

Commissioner Rothschild: All right. It is only third hand instead of fourth. And he has testified under oath

that it is accurate. I wouldn't want the record, in this status, to suggest that if the document is later shuffled into an offer by the applicant, that we will accept this third-hand statement of what this committee thinks, for whatever it may be worth, in these proceedings.

Mr. Anastaplo: That is true, sir. I only indicated one further thing, however, that is, I have also testified under oath that this is an accurate statement of what this justice said to me.

Commissioner Stephan: Said to whom?

Mr. Anastaplo: To me, personally.

Commissioner Bane: I think you were going to give us further instances in which you believe you have requested documents and there has been a failure to meet your request.

Mr. Anastaplo: Yes. I have from time to time requested from the committee statements of its position, its reasons for the action it has taken, which I have not received, in many instances.

Commissioner Carey: Are you talking now about the action that resulted in the Supreme Court of Illinois deciding this case?

Mr. Anastaplo: Yes, sir. I had to go to the trouble of preparing litigation on a decision that I did not know the basis of.

Commissioner Stephan: There will be a five minute recess.

[fol. 63] Commissioner Bane: We are getting near four o'clock. We have a few loose ends. Perhaps in lieu of taking a recess we could continue questioning for five or ten minutes.

Commissioner Stephan: I think we had better have a recess.

Commissioner Bane: That will not conclude the hearing.

Commissioner Stephan: We will have a five minute recess.

[A recess was had.]

Commissioner Bane: Are you ready for a resumption of the examination?

Mr. Anastaplo: Yes. I wonder if I could correct something I said earlier?

Commissioner Bane: Correct it?

Mr. Anastaplo: I mean, add to something I said earlier, with respect to Mr. Rothschild's comment. I do not want it to seem that this comment that I quoted came from someone who did not know what this was all about. It came to me directly from a member of the Court that wrote the opinion in my case.

Now you were talking, Mr. Bane, about other documents that I have not received.

Commissioner Bane: You were talking about them.

Mr. Anastaplo: You were asking me about them. I was mentioning the fact that on several occasions the committee had failed to supply statements of its position when it would have been at least the lawyerlike thing to do, to supply them; that is to say, the committee engaged in the conduct which in the meanest property case—by "meanest" I mean pettiest—or commercial litigation, or any other liti-
[fol. 64] gation that all you gentlemen have acquaintance with—one would feel you would want some statement from the judge as to his decision. Instead, I had to go to the Supreme Court of Illinois, in 1954, to write a brief, a very long brief, I am afraid, on the basis of what I thought the committee might have based its decision on. As it was, I had to cover the waterfront, as the saying goes. It was only after I submitted my brief that the committee submitted anything to me, and even then I believe it submitted it to the Court first, and not to me. I am not certain about that. Similarly, even in the recent activities, I never knew until after the Supreme Court of Illinois handed down its decision, this past summer, that there had been dissents filed by this committee, by certain members of the committee. I found it out by accident. In returning some of the materials to me, the Clerk of the Supreme Court inadvertently included these two dissents. I submit to you gentlemen, this is not the way you treat someone litigating against you.

Commissioner Bane: Have you finished your statement?

Mr. Anastaplo: Yes, sir.

By Commissioner Bane:

Q. Let me ask you now, are you now or have you ever been a member of the Communist Party of the United States?

A. I'm sorry I must refuse to answer that on the basis of the reasons, depending upon American constitutional rights, that I have heretofore—that is here and in the previous litigation—referred to.

Q. Are you now or have you ever been a philosophic communist, that is one who, though not a member of the Communist Party of the United States, is a believer in the principles of communism as expressed by Marx and Lenin? [fol. 65] A. I'm sorry, I think I had better refuse to answer that question also, for the same reasons.

Q. For the same reason?

A. The same reasons, yes, sir.

Commissioner Stephan: Are those the alleged protections of the First and Fourteenth Amendments?

Mr. Anastaplo: And in this case also, perhaps, the *ex post facto* clause.

Commissioner Stephan: Are those your sole reasons for not answering the question?

Mr. Anastaplo: Those are the sole reasons upon which I would not answer them at this time. Let me explain what I mean by that—

Commissioner Stephan: This is when they are being asked.

Mr. Anastaplo: Yes, sir. In my earlier hearings I did rely upon state constitutional grounds. At this time I am not explicitly relying upon them, although I think they are still valid, because I want to make it certain that I am making a claim of privilege on the basis of Federal constitutional grounds.

By Commissioner Bane:

Q. Are you refusing to answer the questions that have just been put to you, and the prior questions which you have refused to answer, by reason of any fear that if you did answer, your answers would preclude your admission to the bar or affect it adversely?

A. Let me say this. I do not want to indicate by my answer—

Commissioner Christianson: I did not hear that.

A. (Continuing) I'm sorry. I do not want to indicate in [fol. 66] my answer to this question, an implicit answer to the earlier ones, and therefore I make a prefatory remark. It seems to be the law now that even a member of the Communist Party, about whom nothing else is known or shown, is eligible for admission to the bar of the state. That is my opinion. Some of you, of course, will differ. That is, a member of the Communist Party who has otherwise a good record and about whom there are no derogatory items in the record. Consequently, I would say that an answer either yes or no to the question whether you are a communist, should not preclude one's admission to the bar. Therefore, I have no fear of what my answer would be. Your problem, I take it, would be to decide—I'm sorry; that is improper.

Q. Do you feel, or do you have within yourself, any feeling of loyalty or devotion to the principles, policies, practices or government of the Soviet Union?

A. I am afraid I must refuse to answer questions which seem to be designed to effect the same purpose as questions about whether one is a member of the Communist Party. I will answer questions, and I will indicate that I think my loyalty, devotion, and so forth, to the principles of the American government, are acceptable. I do not want to say more than that.

I would indicate that what I have said in my writings, that is in the course of litigation, the reasons I have given, the arguments I have made and chosen not to make, indicates a certain faith in certain basic principles that all of us believe in.

Let me also indicate this, if I may make another offer. I have heard occasional rumors—

Q. You say, "another offer." What was your first offer?

A. About the other, before that last break, about the—

Q. The phantom document, so-called?

[fol. 67] A. This very real document, that has the chairman's signature on the back of it.

Q. Do I take it you are offering that document?

A. No, sir.

Q. Do you want to withdraw your reference, then, to "another" offer?

A. Another offer, yes, sir.

Q. Do you want to withdraw that?

A. Another offer—the offer earlier was not an offer of the document, but an offer to listen to a request for a document..

Q. Well, in that sense, you have had offers all afternoon, offers to you to answer questions, haven't you?

A. I say my offer. I mean, you are speaking, in a way—

Q. Well, you proceed with whatever it was you wanted to say.

A. You are speaking, in a way, to the problem of one's sincerity in his position; I mean, I have heard occasional rumors about me, when questioning my sincerity, what I have been doing all these years, and so far as I can tell, they have come for the most part from people who are either ignorant of the record, or moved to defend themselves by whatever means at hand.

Q. Do you want to get more specific, or do you want to be content to let the record stand with just those generalized statements?

A. I plan to go on. And as I read the cases, and the law—

Q. Well, you are not going on.

A. I am going on now.

Q. You are not going on in the sense of giving us any names of people from whom you have heard rumors, or to whom you are referring, or who were referred to in these rumors. Are you going to cover that?

[fol. 68] A. No, I will not cover that.

Q. You will not cover that?

A. I will not cover that at the moment. Now, as I know the law, the question of sincerity might become an issue in this matter.

Commissioner Carey: Would you please take your hand away from your face? We can't really hear.

A. (Continuing) You might decide a man is not sincere, and is not making what I would call a principled stand,

in defense of the American Constitution, which I claim in my own poor way to be making.

Now, the first document I referred to speaks to the problem of sincerity or serious purpose in respect to this matter. That is, the favorable appraisal of my character is implied throughout. But I have an additional reference. I should like to read the concluding sentence of a letter to me from a member of the Supreme Court who was then chief justice. Quote—

Q. Just a minute. Are you willing to identify the letter to which you are just referring, and from which you are about to read? Are you willing to identify that letter by date, addressee and signator?

A. The addressee is me.

Q. The date of the letter?

A. Let me say this. I, myself, am not disposed to enter this letter in the record. But this quotation I have, which I will now read—stay with me for a minute.

Q. Mr. Anastaplo, did you have a course in evidence at the University of Chicago?

A. Yes, sir.

Q. Are you familiar with some of the basic principles of proof?

A. I am prepared to offer proof, sir.

[fol. 69] Q. Do you think—what I am going to ask you now is as a candidate for the bar. I want to just ask you a question.

A. Yes, sir.

Q. Is it proper, in your view, as a matter of proof in a court of law, to offer a quotation from a letter without identifying it, without indicating its date or its signator, or from whom you are quoting? Is that proper, in your view?

A. Sir, there have been many—

Q. I am asking you a question, as if it were on a bar examination. Will you answer me, on the basis of the rules of evidence?

A. My understanding, the answer would be no.

Q. Then you are asking for a waiver of the ordinary rules of evidence?

A. I am only asking the same leniency and disregard for the rules of evidence be tolerated here as are usually toler-

ated in hearings of the Committee on Character and Fitness.

Q. The answer is, yes, you are asking for a waiver of that rule?

A. No, sir, I am not asking for any waivers; I am asking for the same rules or lack of rules. Earlier someone said, it may have been the chairman, that the rules of evidence do not hold—

Commissioner Stephan: May I interrupt you, please? The chair rules that if you want to read from the letter, you have to offer the letter to the committee and have it marked —offer the letter in evidence before you can read from it. Otherwise the committee has no way of appraising the credibility of what is purportedly in the letter, and we are not going to have things read completely out of context with the rest of the letter. If you wish to submit the letter, we will receive it in evidence—

[fol. 70] Mr. Anastaplo: No, I, myself—

Commissioner Stephan: We will consider it.

Mr. Anastaplo: I, myself, do not want to submit it. I am not saying I would submit it, in this case. I am saying that I have a quotation, speaking to the question of sincerity. Now—

Commissioner Stephan: We understand that. You have made that point. Is there anything else you want to make?

Mr. Anastaplo: Yes, I want to say one thing more for the record.

Commissioner Rothschild: May I interrupt? I would just like to know whether the sincerity speaks to yourself as the applicant, or the process that we—

Mr. Anastaplo: To mine, as applicant, and to my activities during the course of my litigation. You can gather from the fact that I want to read it, what it says.

Commissioner Sawyier: Is this in the way of another character affidavit?

Mr. Anastaplo: This is in the way of speaking to the problems that you seem to be raising.

Commissioner Stephan: Why don't you get this particular person to send a letter to the committee recommending you to the bar?

Mr. Anastaplo: It may be improper for me to do so. Let me stress again, I am not offering this letter to be submitted. I am not even certain I would give it to you if you asked for this one. I am only saying—

Commissioner Bane: You only want to read from it.

Mr. Anastaplo: No, I am willing to consider a committee request that I submit this letter.

Commissioner Bane: Mr. Chairman, I suggest the hour is ten past four, the witness perhaps might want to recon- [fol. 71] sider his position on this; in any event, it is clear we are not going to complete our examination today; I suggest that we might consider a recess until another time which is convenient to all concerned.

Mr. Anastaplo: May I note before we close the hearing, the difference between my offer here and the preceding one? In case you were to request this letter, I am not certain I would give it to you. But—

Commissioner Stephan: It is an offer twice removed.

Mr. Anastaplo: But I would be willing—

Commissioner Bane: You didn't propose marriage in that way, did you, Mr. Anastaplo?

Mr. Anastaplo: She had to propose to me.

Commissioner Stephan: I think we understand your point.

Mr. Anastaplo: But I am willing to hear argument on it. And I make the request with some expectation, one, that the point made therein is not really doubted, but I simply want to establish the record.

Commissioner Bane: On this matter of your being willing to hear argument, may I ask you whether you still understand that we are the Committee on Character and Fitness, and you are the applicant?

Mr. Anastaplo: That is true, sir.

Commissioner Bane: You understand that?

Mr. Anastaplo: Yes, sir. May I make one statement, and then I will close.

Commissioner Stephan: If you will make a positive guarantee.

Mr. Anastaplo: Yes, sir. This passage, attesting to sincerity, as I say, was referred to, first, in order to indicate

something that I think none of you would doubt if you were [fol. 72] pushed to make the statement which you have avoided making heretofore in your reports; and secondly, with the expectation that it would not necessarily be requested, and that I myself would have to reserve judgment as to whether I would submit it.

Commissioner Stephan: I think I understand.

Commissioner Thomas: Mr. Anastaplo, you will be informed of the next hearing of the committee on your application.

Mr. Anastaplo: Could I make one request about that?

Commissioner Thomas: Yes.

Mr. Anastaplo: That it not be on days when I am teaching?

Commissioner Thomas: What days are those?

Mr. Anastaplo: Tuesday and Wednesday.

Commissioner Thomas: We will make every effort to attempt to avoid the Tuesdays and Wednesdays for setting of the days. And if, when you are informed of the date, you find it impossible for any other reasons to be here, or desire a change of date, you can get in touch with Mr. Cain, and relay your requests to him.

Mr. Anastaplo: And I will supply you with the information about the—

Commissioner Thomas: It would be best to do that in writing to Mr. Cain.

Mr. Anastaplo: You mean about the date?

Commissioner Thomas: Yes, about the date. After you are informed of the date of the next hearing, and if that date is for any reason inconvenient for you, you can set up the grounds why you would prefer to have some other date, in writing, to Mr. Cain.

Mr. Anastaplo: And I will supply you with the informa- [fol. 73] tion about the election.

Commissioner Bane: If you will, please.

Commissioner Stephan: I would like to ask a few more questions, if you please. Is there anything that you believe is in the committee's records that you feel you need for a fair hearing before this committee?

Mr. Anastaplo: I should like to have any reports made to the committee, by committee investigators, as well as any—

Commissioner Stephan: Do you know of the existence of any?

Mr. Anastaplo: No, I do not know of any current ones. Or any directions or rules under which the committee is operating, of which I do not know. I have the 1939 rules. As far as I know, those are the only ones extant.

Commissioner Weiss: May I make a suggestion, Mr. Chairman, that the files of the applicant are open to his inspection throughout these proceedings. They are his files; this is not an adversary proceeding. Anything in those files he wants to look at, I am sure that the committee would make those files available to him. Am I correct, Mr. Secretary?

Mr. Cain: In his case. Yes.

Commissioner Weiss: It has been a matter of public record.

Commissioner Stephan: Let these hearings stand adjourned until further notice to the applicant.

Mr. Anastaplo: May I ask when a transcript of this hearing will be available?

Mr. Cain: How are you girls set up?

The Reporter: It will take at least a week or ten days.

[fol. 74] Mr. Anastaplo: It would be very useful if I could have it beforehand so I could correct and clear up things that are not so clear.

Commissioner Bane: Before the next hearing, you mean?

Mr. Anastaplo: Before the next hearing, yes.

Commissioner Stephan: Well, in the nature of things I think it is going to be that long, because of prior commitments of several of us.

[The hearing recessed at four-twenty o'clock.]

[fol. 74a]

6030 Ellis Avenue
Chicago 37, Illinois

3 March 1958

Mr. Richard H. Cain, Secretary
Committee on Character and Fitness
29 South LaSalle Street
Chicago 3, Illinois

Dear Mr. Cain:

In view of the matters considered by the Committee during my appearance before them at a closed hearing on February 28, 1958, I feel I should repeat my request of them for a specification of subjects they might inquire into during my next appearance. I should also like to have an indication of what "charges" there might be or adverse evidence the Committee might have to justify inquiry into any subjects not asked about of the usual bar applicant. I submit that the evident inclination of the Committee in my matter to range, for some unstated purpose, over a wide variety of familiar and unfamiliar organizations is basically unfair and a denial of due process of law. I have yet had no indication why inquiries about the Communist Party, the Ku Klux Klan or the Silver Shirts of America should be made of me, nor any indication why these inquiries are relevant and constitutionally appropriate to the function of the Committee.

The Committee seem to feel obliged to fit their inquiries into one of the three subject-areas delimited by the Supreme Court of Illinois in its order of September 17, 1957. These three are "the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California*, 353 U.S. 252, and *Yates* v. *U. S.*, 1 L.ed. 1356, 77 S. Ct. 1064."; "the applicant's activities since his original application was denied"; "his present reputation." Thus, if I remember correctly, an attempt was made, before the long string of organizations was inquired into, to fit such inquiry into the subject-area of

"activities" in the Court's opinion. I submit that such an attempt is, in the light of the litigation preceding the issuance of this order, the discussion in Commissioner Rothschild's dissent, and the obvious import of the Court's order, an unreasonable and deliberately strained interpretation, so much so as to justify basic objections with respect to fairness and reasonableness and to raise further doubts about due process of law under the federal constitution. It is against the background of such a strained interpretation which makes a mockery of "the rule of law" that my requests of the first paragraph above become even more significant.

—2—

[fol. 74b] I am making these requests at this time, and before I receive the transcript of my first appearance before the Committee, in order that I might not delay my next appearance before the Committee. That is, rather than wait for the transcript which I understand will be made available before the next appearance, I make these requests now so that time will not be lost while the Committee prepare any specifications, charges or any other materials they might decide to provide me. I take it that the Committee themselves also need not wait upon the transcript to provide me with what I have asked for. For it was evident, both from the Chairman's introductory remarks about allocation of time and from the matters Commissioner Bane came prepared to ask about and which he did ask about, that nothing I said before Mr. Bane took over the questioning called forth his own inquiries. Consequently, there must be something either in the various affidavits and character recommendations submitted to the Committee in my behalf or in evidence independently gathered by the Committee to justify what I understand to be a departure from usual Committee practice. The constitutional problems raised by many of Commissioner Bane's inquiries and by my refusal to answer them make my requests even more important.

I hope the Committee can supply me with the information I have requested so that I may more adequately prepare myself for my appearances before them. As it is now, I am obliged to try to foresee all avenues, proper and improper,

constitutional and unconstitutional, that Committee inquiry might take. But whatever the Committee response may be, permit me to assure you that I plan to cooperate as fully as possible with the Committee in their efforts to determine whether my character and fitness are adequate for admission to the Bar.

May I turn now to another subject? I should like, in order to avoid any misunderstanding and to aid the Committee in making their plans for my next appearance before them, to make a few comments upon the two documents concerning justices of the Supreme Court of Illinois I mentioned during our meeting of February 28. The first document, as I have said, incorporates the observation made to me by a member of the Supreme Court of Illinois which decided my 1954 case, "No one ever thought you were a Communist." The second document to which I referred was one in which my sincerity was recognized by a member of the Supreme Court of Illinois who was, at the time he wrote me a letter reporting his and his associates' sentiments on this subject, Chief Justice of the Court. *I have identified neither gentleman,* nor have I given a date for either document, except to say that it is later than the opinion of the Court at 3 Ill. 2d 471. It is not necessary for any of my purposes that I should submit the documents at this time.

It *is* enough for my purposes that I should have testified under oath that both of these sentiments were expressed by men very much in a position to be taken seriously when [fol. 74c] they make *such* comments about an applicant who

has been excluded from the bar for the ostensible reason that he had refused to answer questions about possible Communist Party affiliation. (In this connection, consider these two quotations:

(1) "Looking to the record, to the committee report to this court, and to petitioner's brief, we find that the crux of the controversy is centered upon petitioner's refusal to answer as to whether he was a member of the Communist Party or of any of the subversive organizations on the list compiled by the United States Department of Justice." *In re Anastaplo,* 3 Ill. 2d 471 (1954).

(2) "The petitioner repeatedly stated that his refusal to answer certain questions was based on the principles of the Bill of Rights. Yet a reading of the opinion of the Supreme Court of Illinois conveys the impression that the petitioner was probably a member of the Communist Party." Note, "The Illinois Bar and Individual Freedom," Northwestern University Law Review. Vol. 50, No. 1, March-April, 1955 (footnote 6, pages 95-96).)

Let me add here the comment that my report of the Justice's observation, "No one ever thought you were a Communist," does not constitute an answer on *my* part to the inquiry as to whether I am now or have ever been a member of the Communist Party. It is not one of my purposes, in reporting the fact of the Justice's observation, to leave the impression that *I* am, despite the principles I have heretofore relied upon, answering the question about my affiliations.

I chose to testify that both this observation and the other one relating to "sincerity" had been made to me, only after it became clearly evident to me what the course of inquiry was that the Committee, overruling many objections by me, had commissioned Mr. Bane to embark upon. The first quotation, "No one ever thought you were a Communist," critically undermines whatever justification there might have been argued to be in Mr. Bane's inquiry as to whether I have ever been a member of the Communist Party. Not only that, but it is the "best evidence" for calling into question the rationale and good faith both of the Committee action which has excluded me from the bar for over seven years now and of the warnings, during the course of the hearing last week, that a failure to answer the questions asked might, in the light of the record, tend to contribute to a denial of admission to the bar. The second document relates to a simple point, but one that has to be made in the light of the Committee's conduct which required me to refuse to answer questions about possible membership in a long series of familiar and unfamiliar organizations of a political character. That is, it *might* be important in such circumstances that one who presumes to resist a commit-

tee's claims and conduct should be recognized as sincere—and this is what the letter referred to does recognize.

I testified under oath that members of the Supreme Court had expressed to me the observations I referred to. There

[fol. 74d] was then no need, in order to establish the point, to submit the documents themselves, for it cannot matter to the Committee *what* members of the Court had said these things. It is enough for my purposes that I have testified that two different members of the Court *did* tell me these things. If the Committee had doubted either of the facts reported—i.e., the fact that I was "sincere" or the fact that "no one had ever thought (me) a Communist"—or if the Committee had doubted that members of the Supreme Court, mistakenly or not, had made these observations to me, then the Committee could have requested the relevant documents from me. Since the documents reported facts the Committee have always known even though never publicly admitted, I thought it highly unlikely they would feel they had to see the relevant documents. (I am prepared to argue, that is, that the observations of the Supreme Court justices reflect what has been evident all along anyway—and in fact I have so argued. See, e.g., Appellant's Petition for Rehearing, March 23, 1955, pages 3-4. I submit that the testimony I have given with respect to these observations makes my argument conclusive.)

Furthermore, as I indicated last week, although I was willing to rely upon my judgment in reporting that such observations *were* made, I did not need to rely upon my judgment as to whether the related documents themselves should be submitted. As I have already noted, such submission was not necessary for my purposes. In addition, I want to avoid even the suspicion of impropriety on my part. Consequently, I was willing with respect to the first document reporting the observation of a Supreme Court justice, "No one ever thought you were a Communist," to waive any constitutional rights I might have had to withhold the document and to defer to the judgment of the Committee. Since, under the circumstances and for my present purposes, I do not need to have the document entered upon the record,

it is only prudent and proper on my part to rely upon the judgment of a character committee. If the Committee for any reason had thought they should see the document I identified as I did, then a simple request would have procured it for them. The critical thing for my purposes is that I testified to the statement of *a* justice who was on the 1954 court and that the Committee could have asked for the related document.

The other document is somewhat different with respect to circumstances. Once again, I did not need to enter the document in the record in order to fulfill my purposes, purposes which (it should be emphasized) were determined by the conduct of the Committee last Friday. It was enough to indicate that there was also a testimonial with respect to "sincerity." Once again also, I thought it proper to rely upon the judgment of the Committee on whether the letter should be entered. But, as I further indicated (by my reference to a willingness on my part "to hear argument"), the different circumstances attending the receipt of the second observation were such that I would not have handed over the letter simply on the request of the Committee. Rather, after indicating the contents of the letter and indicating without identifying its source—which were all I [fol. 74e] needed for my purposes—I was prepared to

listen to advice from the Committee as to whether they wanted this letter submitted. If the Committee had indicated that they thought submission of the letter necessary and proper for *their* purposes, or in order to test or challenge what I had testified to, then I was prepared to ask the member of the Court involved whether he had any objections to my release of the letter to the Committee. I would then decide what course to take. I agree with the comments made by Committee members toward the end of the hearing that I was very far from offering the letter to the Committee.

Permit me to add that the more I reflect upon this matter, the less inclined I am to release even to the Committee in closed session, and even with the writer's consent, the letter I referred to in the closing minutes of the hearing last Friday. Should a Committee request be made that the

letter be entered, I would prefer to lose the advantage of a testimonial as to "sincerity" rather than release the document. I hope the Committee agree with me that no matter how relevant the letter might be to the Committee's function, it should not, in these circumstances, be entered in the record. Does not all this demonstrate to the Committee, in a way that I have not been able to do before, that there are criteria other than that of "relevance" that should be employed in solving the problem of what should be admissible as "evidence" in Committee proceedings? It is to be regretted that the Committee did not see fit to apply such criteria to the variety of improper inquiries to which I was subjected last Friday.

In any event, I have testified to two observations which repudiate much of what the Committee have done the past seven years *and what it seemed to me they were continuing to do during the hearing of last week.* In fairness both to the members of the Court involved and to myself, I am sending copies of this letter to those members of the Court in order that they may know what I have and have *not* done, and in order that I may profit from any advice they may want to offer me at this time. I should like to send them also the relevant excerpts from the transcript when I receive it in order that it may be clear to them that I at no time attempted to enter in the record the documents referred to. Let me note once again that although there is at this time neither a need nor an intention on my part to enter these documents in the record, I am prepared to show that the observations made by the members of the Court were honest and in conformity with the record made in my litigation extending from 1950-1955 as well as with developments since.

In conclusion, I should like to note that it would not be necessary to discuss the various points made in this letter but for the reversion by the Committee to a pattern of inquiry that still seems to me probably unconstitutional and certainly unfair. I am prepared to argue that a *prima* [fol. 74f] *facie* case with respect to my character, fitness

and ability and willingness to take the required constitutional oath as attorney has been established by my recent application and associated character references and affidavits. May I once again urge the Committee, in the interest of constitutional government and fair play, to restrict themselves to their proper function and to proper means in testing that *prima facie* case. I myself plan to cooperate as much as I can with any legitimate attempt by the Committee to inquire into my character and fitness. Even so, I trust the Committee appreciate the fact that my experiences of the past decade incline me to take whatever precautions seem necessary and proper to protect myself in my endeavour to defend the cause of constitutional government and the rule of law.

Respectfully yours,

GEORGE ANASTAPLO
Counsel *pro se*

[fol. 75]

HEARING BEFORE COMMITTEE ON CHARACTER AND FITNESS

FIRST APPELLATE COURT DISTRICT OF ILLINOIS

SITTING AS COMMISSIONERS OF THE
SUPREME COURT OF ILLINOIS

In re: GEORGE ANASTAPLO — Session II

Proceedings: March 21, 1958

Reported by: Mabel A. Lesser

Present:

Commissioners Charles A. Bane, James P. Carey, Jr., J. R. Christianson, Richmond M. Corbett, James E. Hastings, Walter H. Moses, John M. O'Connor, Jr., Edward I.

Rothschild, Calvin P. Sawyier, Francis J. Seiter, Len Young Smith, Robert A. Sprecher, Edmund A. Stephan, D. Robert Thomas, Jerome S. Weiss, Horace A. Young.

*****

Richard H. Cain, Secretary.

*****

COLLOQUY BETWEEN COMMISSIONERS AND PETITIONER

Commissioner Stephan: Good afternoon. The meeting will come to order. I see no need for swearing the witness in again, because your oath is considered to be continuous throughout the hearing.

[Mr. Anastaplo nodded assent.]

Commissioner Stephan: You have asked to examine the committee's files in connection with this hearing, in order to have access to information we might have beyond that which is in the questionnaire that you filled out and submitted to us. Have you seen the file?

Mr. Anastaplo: Yes, I have just examined the file.

[fol. 76] Commissioner Stephan: Do you have any queries in connection with it?

Mr. Anastaplo: Well, am I to understand, then, that this is the complete file or record on which the committee is now proceeding?

Commissioner Stephan: That is correct. There are no reports, oral or written, which this committee has on your qualifications, in connection with this hearing. We have caused none to be made. There is no other information; we have caused no other investigation.

Mr. Anastaplo: There is no other information, then, upon which this inquiry is being conducted?

Commissioner Stephan: We are conducting the inquiry on the basis of the record and such matters as may develop in the course of your testimony.

Mr. Anastaplo: I wonder if I may ask a question. In fact, I have several questions to ask, of a procedural nature, before we start.

Commissioner Stephan: I would like to make a statement before you do, to clarify the committee's position. You have

asked us in your letter of March 3, 1958, for a statement of charges or evidence that we might be considering in connection with your application. We have discussed the request and we feel that in large measure you somewhat misconceive the purpose of this proceeding. This is not a lawsuit, it is not an indictment, it is not something that lends itself to pre-trial discovery procedure. This is an inquiry into your fitness to practice law in the State of Illinois. We do not intend to be restricted in any way by any initial outline that we might make of the matters we are going to go into. We are not certain what matters we are going to go into. To a large extent they will be determined by the responses you make to the various questions put to you. We conceive it is our duty, under the direction the Supreme Court has given us, to inquire broadly into [fol. 77] your fitness to practice law.

Mr. Anastaplo: Am I to understand, then, that the committee does not now have an idea of the general areas they are going to inquire into?

Commissioner Stephan: The general areas have been outlined in the Supreme Court order.

Mr. Anastaplo: And do you feel the questioning is limited to those areas unless something else develops?

Commissioner Bane: Mr. Chairman, I would suggest that the statement which has been made to the applicant is ample, and that there is nothing to be gained by further questions from the applicant, or responses.

Commissioner Stephan: I agree with that, Mr. Bane. The only other thing I would like to say is that in the very nature of an inquiry into character and fitness, it just isn't possible to pinpoint matters we are going to go into, because the concepts themselves are broad. We think they give us considerable latitude in questioning you.

Mr. Anastaplo: Then I assume the committee do not want to elaborate on the question of whether they are limited by the Supreme Court order?

Commissioner Stephan: No.

Mr. Anastaplo: Do I understand correctly that the Rules of the Committee of 1939 are still extant?

Commissioner Stephan: Do you mean Rule 58?

Mr. Anastaplo: No, the rules of the committee, Rules of Procedure of September first, 1939.

Commissioner Carey: That is Rule 58?

Mr. Anastaplo: Are those rules still in operation?

Commissioner Carey: That is Rule 58. He is talking about Rules of the Supreme Court. Hand it up, will you please?

Commissioner Stephan: Will you let me see what you [fol. 78] are talking about?

[The pamphlet was handed to Commissioner Stephan.]

Commissioner Carey: Are you talking about the Rules of the Supreme Court of Illinois?

Commissioner Stephan: He is talking about the Rules of Procedure of the Committee on Character and Fitness in effect September 1, 1939.

[There was discussion, stated to be off the record.]

Commissioner Bane: I would like to suggest that the applicant indicate to the committee which provisions of the 1939 rules he is particularly interested in ascertaining whether they have present vitality or not.

Mr. Anastaplo: I am interested in all sixteen of them, and I would like to know whether these rules are still in operation. There are several of them I would like to refer to from time to time.

Mr. Cain: We still follow those rules.

Commissioner Stephan: These rules are still in existence.

Mr. Anastaplo: They have not been suspended, then?

Commissioner Stephan: No.

Mr. Anastaplo: I should like to know, then, if you care to tell me, how the inquiry so far fits into Rule 9 of this committee's rules?

[The pamphlet was handed to Commissioner Stephan.]

Commissioner Bane: Mr. Chairman, I would like to suggest as a matter of expedition that we proceed in the committee to inquire into the character and fitness of the applicant, and if he at any point believes that the questioning transgresses any of the 1939 rules, he can be free to raise that objection at the particular time. I don't believe

we ought to be confronted with questions in the abstract [fol. 79] from the applicant since it is, after all, the applicant, who is applying for admission to the bar, who has the burden of establishing his character and fitness.

Mr. Anastaplo: May I say something to that, Mr. Chairman?

Commissioner Stephan: I might say I have read Rule 9 and I think what we have done is entirely consonant with it. Rule 9 states that:

> "At the hearing before the Committee, or any section thereof, the applicant shall be first duly sworn, and thereupon interrogated orally upon the subject matter covered by the verified questionnaire and the record submitted therewith, so as to bring out fully the facts sought to be discovered by said questionnaire."

Mr. Anastaplo: Does the committee indicate, then, that the inquiries into the various affiliations are inquiries that come within the subject matter covered by the verified questionnaire?

Commissioner Stephan: Yes. You are asked in the verified questionnaire, amongst other questions, whether you will support the Constitution of the United States and the Constitution of the State of Illinois. We are testing your belief in the bona fides of your answer to that question, as well as the general subject of your character and fitness. So with that, we will proceed, Mr. Bane.

Mr. Anastaplo: I have a few more problems, Mr. Chairman. I have several objections on aspects of the hearing thus far, which I am quite willing to put in writing, in a letter. I think it would be more expeditious, however, and most fair, if the committee were to hear them and rule on them at this time, unless the committee wants to assume [fol. 80] that they will in advance overrule any objection I might make.

Commissioner Stephan: Well, I don't like that last comment of yours.

Mr. Anastaplo: The reason I mention that is the possibility of writing a letter about objections that should have been made at this stage.

Commissioner Stephan: You are dealing with a group of people, Mr. Anastaplo, who are making a sincere effort to give you a fair hearing. We are not making rulings before we hear any objection you have made or will make.

Mr. Anastaplo: That is why I want to make the objections at this point.

Commissioner Stephan: Will you state them as concisely as you can, so we can get on with the hearing.

Commissioner Bane: I wonder if I might ask Mr. Anastaplo if these objections are going to go to questions which have already been asked, or to questions which he thinks might possibly be asked today?

Mr. Anastaplo: Those that have and will be asked, with respect to the line of questions with which we terminated at the end of the last hearing, the question of affiliations.

Commissioner Bane: I think the applicant might make a short, concise statement for the record of what his objections are, and I think we should then proceed.

Commissioner Stephan: Please do.

Mr. Anastaplo: May I ask first of all, then, if my March 3rd letter is part of the record?

Commissioner Bane: I wonder if we haven't indicated to the applicant that we are waiting to hear his objections. Isn't that clear to you, Mr. Anastaplo?

Mr. Anastaplo: Mr. Bane, it is possible that the March 3rd letter may have something to do with my objections. [fol. 81] Commissioner Bane: Can't you state your objections in a positive way?

Mr. Anastaplo: It may help to know certain things before I state them. However, if you want them stated, I will state them directly.

Commissioner Bane: That is what we want.

Mr. Anastaplo: Now that I know one area the committee intends to inquire into, I should like to make objections to questions that relate to affiliations, both as to the February meeting and any that might be asked today. The objections I would like to make themselves bear on the issue of my character and fitness and on the significance of my refusal to answer certain inquiries. The Supreme Court of the United States has indicated—

Commissioner Stephan: Wait just a moment. I can hardly hear you. If you are reading from something there,

we don't want it read into the record. There is one thing I want to make clear to you before you go farther. You are going to have an opportunity to submit a memorandum of law to this committee, or a brief, at the close of the testimony. If there are legal issues you want to argue, this is not the time to engage in that kind of exercise. If you have general objections to what we have done, or what we intend to do, please state them concisely.

Mr. Anastaplo: Let me finish the sentence I was about to read.

Commissioner Stephan: You were muttering, almost. I couldn't hear it.

Mr. Anastaplo: I am sorry.

Commissioner Bane: If you have a written statement, why don't you simply submit it?

Mr. Anastaplo: These are rough notes, in the first place. In the second place, there may be occasion for rulings on some of the points in these notes.

[fol. 82] I was about to say that the Supreme Court of the United States has indicated that the reasons why an applicant refuses to answer inquiries may be relevant and important in passing upon his character and fitness. I should like to indicate these reasons as I go along.

Commissioner Bane: At the last session you were asked certain questions and you registered certain objections; you spelled them out, spelled out what your bases were and what they were not. The chairman of the subcommittee asked you at one point whether you had outlined all of your objections, and you said you had. It seems to me, Mr. Chairman, the applicant is retracing ground he already covered on the last hearing. If he now intends to go into reiteration as to why he did not answer questions that were asked at the last hearing—

Commissioner Stephan: I think we will proceed this way. If you have objection as to what has already gone into the record, you will receive ample opportunity to comment on it before the proceeding is over. If you have objections as to questions about to be asked, you can state those when you are asked the question.

By Commissioner Bane:

Q. Let me call to your attention question 19(c) on the questionnaire and the response which you gave to it. Then I want to ask you certain questions concerning it.

We are now beginning the examination, resuming the examination.

Mr. Anastaplo: May I record, then, that I am not making the objections or the comments that I think are appropriate at this point, some of which I stress, again, may cut off further inquiry along these lines?

Commissioner Stephan: You can raise those as the questions are asked.

[fol. 83] Mr. Anastaplo: May I ask another question?

Commissioner Bane: Mr. Chairman, may I proceed with the examination of the applicant?

By Commissioner Bane:

Q. I want to call your attention to question 19(c) on the questionnaire, which asks: "State what you believe are some of the obligations of good citizenship." Your response is as follows: "In addition to the answer given in my questionnaire of October 26, 1950, I should like to emphasize the obligation of a good citizen to 'honestly strive against the many lawless and unrighteous deeds which are done in a state.'" End of the answer.

Will you tell us first, the source of the quotation?

A. You are asking me now?

Q. Yes, you quoted it.

A. The quotation is from the Apology of Socrates.

Q. I beg your pardon?

A. It is from the Apology of Socrates.

Q. Can you give us page reference or book reference?

A. Any standard work will have it.

Q. By "book," I don't mean volume as published. I mean—

A. Any standard work.

Q. I mean the chapter or page number within which it occurs.

A. Not offhand, of course not.

Q. You are simply referring to the work as a whole?

A. It is a very short work.

Q. That is as set down by Plato?

A. Yes, as recorded by Plato.

Q. There are no extant writings by Socrates himself; is that right?

A. That is true.

Q. Will you now give us examples of what you deem to be [fol. 84] lawless and unrighteous deeds which might occur in the United States, and which you, as an American citizen, would feel called upon to strive against?

A. By "strive against," I mean oppose.

Q. I am not asking you what you mean by "strive against." I am asking you if you will give us examples of lawless and unrighteous deeds which you would strive against.

A. I suppose a lawless deed would be a corruption of officials in a city, against which one might take action, by legal action or other means.

Q. How about unrighteous deeds?

A. The most striking example that comes to my mind is the action of this committee the last seven years.

Q. Taking the action of this committee as an example of an unrighteous deed, how would you conceive that you ought to strive against it?

A. First by refusing to bow before the men of the committee in the course of the examination, and thereupon to take action necessary when the decision has been rendered.

Q. Is there any other way in which you might strive against it?

A. I might tell a few people about it, and try to persuade them this sort of thing is not desirable.

Q. What would you expect them to do after you had told them about it, or what, if anything, would you urge them to do?

A. To think about it, and reflect upon what it means to a society that permits such things to happen.

Q. Would that be the end of what you would hope or expect to do?

A. That is practically what I have done.

Q. You haven't answered the question. Is that the end of [fol. 85] what you would hope or expect to do?

A. That is about it.

Q. Would you urge them to any action of any kind?

A. Probably not; simply a matter of expressing my views on the subject and letting people know about it, generally.

Q. Can you give us any other examples of what you might consider to be lawless or unrighteous deeds which you, as an American citizen, would feel called upon to strive against?

A. I suppose actions of other bodies of government, for instance, where power is usurped, and responsibilities are misused.

Q. Can you be specific? Can you give us an example of anything that may have occurred in the past six or seven years that you would have regarded as lawless and unrighteous deeds?

A. I would suppose one example of an unrighteous deed would be some of the actions in connection with the Crime Investigation Commission in this city in recent years.

Q. You give the activities of the Crime Investigating Commission as an example of an unrighteous deed—

A. I say, some of the actions of the Commission, some of the questions on the part of the Commission.

Q. Would you have regarded any of the actions which the Commission was investigating as having been unrighteous?

A. I suppose so—definitely so. I would oppose those by trying to assure we had elected officials who would determine to suppress such activities by lawful, constitutional means.

Q. You used the phrase, "strive against." Do you mean that you would strive against these deeds, lawful and unrighteous—lawless and unrighteous, by lawful means?

A. I mean that I would probably use it in the sense Socrates used it, and that is, to try to persuade people and induce them by one's example, which is the way he proceeded [fol. 86] in almost all cases.

Q. You say, "almost all cases." Are there some cases in which you can conceive of any way you would believe a citizen would be entitled to oppose a lawless deed by action which the State itself deems to be lawless?

A. Certainly.

Q. Give us examples, would you?

A. The American Revolution.

Q. I am talking about you, Mr. Anastaplo.

A. I thought you wanted examples of a situation—

Q. I asked for—

A. I say the American Revolution is an example.

Q. I am talking about a case in which you might find yourself involved. You are the one who has answered that you conceive one of the obligations of good citizenship to be to "honestly strive against the many lawless and unrighteous deeds which are done in a state."

A. I think the best way to see what I mean is to look at the examples I give. There are at hand right now, no instances where I would be willing to use lawless activities to oppose deeds. That is true. I must look to other examples. There are none at hand right now; I must go elsewhere in time or geography.

Q. I take it that as you stand in the United States, in the year 1958, there is nothing going on in the United States, or in the State of Illinois, which you deem so lawless as to call for action on your part which might be lawless; is that correct?

A. That is true. I can't think, offhand, of anything. Did you have something in mind?

Q. No, I am just trying to get some information as to the meaning of a pretty generalized quotation put into your [fol. 87] application without indication of its source.

A. May I ask whether you usually get much more precise answers in your questionnaires?

Commissioner Stephan: The question is out of order.

By Commissioner Bane:

Q. You have also stated—

Mr. Anastaplo: May I interrupt a minute, please?

Commissioner Stephan: You have.

Mr. Anastaplo: May I interrupt again?

Commissioner Stephan: Yes.

Mr. Anastaplo: I would like to make one of the objections that I have been precluded from making, at this time, and that is, that as far as I know, these inquiries, both at this time and last time, are completely unusual with respect

to applicants for admission to the bar, and that there has been no justification made, or any indication at all as to why they should be indulged in at this time.

Commissioner Stephan: I am glad you raised that point, because I was going to comment on it later. I want you to know, and I want the record to show clearly, that it is not at all unusual for this committee to inquire into possible communistic or subversive, other subversive affiliations, on the part of applicants to the bar. We ask it often.

Mr. Anastaplo: You ask it often?

Commissioner Stephan: We ask it often and we have asked it often in the past, especially since the end of World War II.

Mr. Anastaplo: Then I should like to submit for inclusion in the record, a document filed in the Supreme Court of Illinois by a former member of this committee, who, after ten years of experience, could make a statement that seems to me to question whether or not this is so, in this sense—[fol. 88] that he speaks—let me get the citation.

Commissioner Bane: I wonder if we can get identification of the document.

Commissioner Stephan: It should be submitted for identification if you are going to read from it.

Mr. Anastaplo: This is, "Suggestions of Stephen Love, Former Member of the Committee on Character and Fitness," filed in the Supreme Court of Illinois, January 14, 1954.

Commissioner Stephan: Will you hand it up, please?

[The document was handed to Commissioner Stephan.]

Commissioner Sawyier: Mr. Chairman, is that a sworn statement?

Mr. Anastaplo: By Mr. Love? I hardly think so.

Commissioner Stephan: No, these are, "Suggestions to the Court." It is part of the earlier record.

Commissioner Sawyier: Mr. Love is an attorney?

Mr. Anastaplo: That is true.

Commissioner Rothschild: It is a matter of record, and was filed in the first case.

Commissioner Stephan: I have marked the document that the applicant is reading from, as Exhibit 2 for identification.

Mr. Anastaplo: May I read the relevant quotation, or shall I simply indicate that it is on page seven?

Commissioner Stephan: You may read it.

Mr. Anastaplo: You will read it?

Commissioner Stephan: No, you may read it.

Mr. Anastaplo: "If the question"—that is the question of Communist Party membership—

> "If the question is desirable, then the Committee should ask it, or the Supreme Court should indicate the desirability of asking it, of every applicant for admission to the bar; it seems most unfair to submit [fol. 89] this applicant to a three hour examination along these lines—particularly when the evidence does not show any Communist activity or sympathy on his part—while subjecting no other applicant to similar inquiries; several thousand applicants have been passed since the inception of the 'cold war' without being asked a question along these lines."

Commissioner Stephan: That is Mr. Love's private view. I think it is a common experience of the committee members that when we are dealing with applicants in subcommittee, where two of us examine the applicant, the question is frequently asked about communistic affiliations. I have asked it, and I know of my own knowledge that many others have asked it.

Mr. Anastaplo: Do you ask it randomly?

Commissioner Stephan: We ask it the way we think it ought to be asked.

Mr. Anastaplo: You don't indicate—

Commissioner Bane: May I resume, Mr. Chairman?

By Commissioner Bane:

Q. Let me call your attention to question 20: "Do you now without any mental reservation and will you hereafter loyally support the Constitution of the United States and the Constitution of the State of Illinois?" The answer is, "Yes." Do you recognize that as the answer which you gave to a question on the questionnaire as of October 15, 1957, the date of the questionnaire?

A. Certainly.

Q. Would you, if I asked the question today, give the same answer?

A. That is true.

Q. Does that answer to that question mean that you subscribe to the general division of governmental powers, prescribed in the Federal Constitution, into three branches [fol. 90] —the executive, the legislative and the judicial?

A. That is—I roughly adhere to that, in the sense, may I add, that it is not the clear-cut division that might be suggested by that comment.

Q. You say you would roughly adhere to it. In what sense would you not adhere?

A. Just what I indicated, that the division seems to be not as clear cut as we sometimes think it is.

Q. But to the extent that it is set forth in the Constitution of the United States, and to the extent that you understand it, do you support it?

A. Yes, sir.

Q. And do you generally support the provisions in the Federal Constitution with respect to federalism, that is, the division and separation of powers as between the Federal Government and the States?

A. That is true, sir.

Q. I take it that you would agree without much question that you agree with the provisions contained in the first ten Amendments to the Federal Constitution of the United States?

A. Yes, sir.

Q. Do you have any belief that ultimately in this country there will be no need for a Federal Constitution, by reason of the class struggle which will lead to the ultimate disappearance of the state?

Commissioner Moses: May I ask, are you using "state" there to mean one of the forty-eight, or do you mean, simply, "sovereign state"?

Commissioner Bane: I mean "sovereign state", and the reference to the class struggle and ultimate disappearance of the state is a shorthand reference to the principles of Marx and Lenin.

[fol. 91] By Commissioner Bane:

A. And I have indicated—

Q. I am asking you whether you believe it will ever become unnecessary for the United States to have a Federal Constitution by reason of any belief on your part that there will be an ultimate disappearance of the state, and consequently any necessity for government?

A. I think I shall have to refer back to the position I took the last period to questions of that kind. I am prepared—is this an appropriate time, Mr. Chairman?

Q. I want to ask you one more question before you state anything.

Commissioner Stephan: I think I will let him object to the question if he wants to object to it.

Mr. Anastaplo: I have this long list of objections. Perhaps Mr. Bane had better finish on this.

Commissioner Stephan: Do you refuse to answer the question?

Mr. Anastaplo: Yes, on the grounds that I think I indicated last time, and which I am prepared to indicate again.

Commissioner Stephan: I think you will have to indicate why you don't answer the question, and not do it by incorporating other material.

Mr. Anastaplo: All right.

Commissioner Stephan: I ask you again, in the interest of speed, not to deliver a brief on the point. Let's just state objections as they are conventionally stated.

Mr. Anastaplo: I am somewhat puzzled by what is conventional before this committee.

Commissioner Stephan: I think you get my point. You have a habit of taking a point and using it as a springboard to deliver a dissertation on political science. All we want [fol. 92] is for you to give your objection as concisely as you can, to Mr. Bane's question.

Mr. Anastaplo: You want, then, simply the reference to the constitutional provisions, and will permit me later on to amplify them; is that it? There seems to be no alternative.

Commissioner Stephan: You state it—

Mr. Anastaplo: Mr. Chairman, which way do you want it? Do you want me to state it the way I want to state it,

or simply by reference, without spelling out which point I am referring to?

Commissioner Stephan: You can state your objection by referring to the Constitution, and you can enlarge on it if you wish. I am just asking you to bear in mind we have a long way to go, and we can't listen to a dissertation on each question.

Mr. Anastaplo: May I say first of all, that the objections I have made I should like to have referred back to the objections I made last time as to affiliations.

I object that the revelant Illinois Statutes—Illinois Revised Statutes, 1951, Chapter 110, Par. 259.58 and Chapter 13, Par. 4, revelant Supreme Court Rule 58, and the Committee Rules, are in themselves unconstitutional in so far as the committee is concerned on this kind of inquiry.

Do I stop for a ruling on these?

Commissioner Rothschild: I would like to hear his reasons for that.

Commissioner Stephan: All right. State your reasons.

Mr. Anastaplo: I say that these various rules and statutes, in so far as they permit or require the kind of inquiry [fol. 93] Mr. Bane has been making and is in the process of making, and in so far as they permit or require the committee to rule adversly against me because of the answers I have been making, are in themselves unconstitutional under the First and Fourteenth Amendments to the Constitution, as well as under the *ex post facto* and attainder clauses of that instrument.

Commissioner Rothschild: May I interrupt? I would like the applicant to relate this objection to the specific questions Mr. Bane has asked. What he has there is apparently prepared in the form of some broadside objection. I would like it related to the specific questions asked by Mr. Bane.

Mr. Anastaplo: That is, the inquiry into one's belief.

Commissioner Rothschild: The very question he asked you.

Mr. Anastaplo: Certainly, with respect to each of these points?

Commissioner Rothschild: No.

Commissioner Bane: I think Mr. Anastaplo ought to make it clear whether these objections are going to the question I put to him as to whether he expected at some time there would no longer be a need for a Federal Constitution by reason of the ultimate disappearance of the state.

Mr. Anastaplo: You further went on to say, in effect, "Do you believe in the doctrines of Marxism-Leninism?"

Commissioner Bane: Without regard to what the witness thinks the question was, the question is as I have just repeated it. I think we are entitled to know whether he is not answering the question and why he is not answering the question.

Commissioner Stephan: Was there some reference to Marxist-Leninist doctrine in the earlier question?

[fol. 94] Commissioner Bane: There was.

Commissioner Stephan: Is that still part of the question?

Commissioner Bane: The crux of the question is to ask the witness if he thinks we will come to a time when there will be no need for a Federal Constitution.

Commissioner Stephan: Can you restrict yourself to that question for the moment?

Mr. Anastaplo: Am I to forget there was a quotation or some kind of adaptation—

Commissioner Stephan: Regardless of who might have entertained any other—

Mr. Anastaplo: —I am not to say anything about the Marxist-Leninist question, Mr. Bane's identification of it?

Commissioner Bane: I wonder if we can have an understanding. Let me ask the witness the question now and let us see whether he will answer it or not.

By Commissioner Bane:

Q. Do you believe that a time will ever come when there no longer will be a necessity in the United States for the Federal Constitution—period. That is all there is to it, end of the question.

A. And in answer to the question, I am to disregard anything else you have mentioned?

Q. You have heard the question.

A. Is that assumed? I would say no, I don't think it is very likely that the Federal Constitution—that the need for the Federal Constitution will be superseded.

Q. Does that mean, then, that you do not subscribe to the Marxist-Leninist doctrine that as a result of a class struggle there will be a disappearance of the state, and consequently a disappearance of any need for a written docu-
[fol. 95] ment concerning the government of that state?

A. And that I refuse to answer, on the grounds that I have just indicated, and I am willing to indicate how those grounds relate to Mr. Bane's question.

Commissioner Stephan: I would like to hear you on that.

Mr. Anastaplo: I said that if these various statutes and rules permit this inquiry, under the committee's assumption, if they in fact permit the inquiry—which I will challenge later—if they in fact permit the inquiry, then they are unconstitutional under the First Amendment, because they constitute an abridgement of my right to freedom of speech; they are unconstitutional under the Fourteenth Amendment because they constitute a violation of the right of due process of law and the equal protection of the laws. They are unconstitutional under the *ex post facto* and attainder clauses of that instrument because they constitute an imposition upon me of tests which have not been previously established by law.

Commissioner Rothschild: Mr. Chairman, I would like to have the applicant state in what respect does it infringe on his freedom of speech.

Commissioner Stephan: Will you please elaborate on the First Amendment point?

Mr. Anastaplo: I would be glad to elaborate in detail and indicate that this objection applies both as to the statutes as well as to the inquiries themselves, assuming the statute is constitutional.

First, this inquiry, this kind of inquiry first arose in my matter because of legitimate opinions I had expressed about political matters, and they constitute, therefore, a kind of penalty for expression of these opinions. Secondly, the affiliations or views I may have as to any of the organi-
[fol. 96] zations inquired about, may be protected by the First Amendment and no penalty can be exacted by the State in such matters as these, for either these views or any of the affiliations I have been asked about. I would further state, inquiries into these views or into the affiliations I have been asked about, are themselves probably

unconstitutional, as invasions of one's private beliefs and associations. Fourth, in any event, the right not to testify on such matters is protected by the First Amendment against any adverse reaction by such refusal on the part of any State authorities. Fifth, my refusal on principle to testify to any of these inquiries itself constitutes a form of expression and protest against such inquiries, a form which is protected by the First Amendment, and may I add, the First Amendment made applicable to the states by the Fourteenth Amendment.

I have available other elaborations for other of the points.

Commissioner Stephan: May I ask something, Mr. Bane?

You make these statements, Mr. Anastaplo, having in mind that the Supreme Court of Illinois has, in effect, passed upon the propriety of one such question, namely, whether you are a communist, and has said it is a proper question; and that the Supreme Court of the United States declined to review the proceeding. How do you reconcile those facts with the objection you just made?

Mr. Anastaplo: There are several ways of reconciling them. First, the Supreme Court may simply have been wrong in 1954, and I believe it was. Secondly, the Supreme Court of the United States did not pass upon my matter; it denied a review, which—

Commissioner Stephan: Did what?

Mr. Anastaplo: Denied a review, which indicates noth- [fol. 97] ing at all about the merits of the case. Thirdly, when the Supreme Court did rule upon this matter, in a case that in many ways was much more difficult than mine, it ruled in a way that would have overturned the Supreme Court of Illinois decision as it had ruled in '54. Fourthly, I am not bound ultimately, nor are any of you gentlemen bound ultimately, by what rulings any court may have made at any particular time. You are required, as lawyers, to use your judgment and advise clients of the possibility of the Court overturning these rules, and not to say they are necessarily right.

Commissioner Stephan: I can't help linking your comments about the unrighteous conduct of this committee with the facts we know, namely, there have been two reviews of the conduct of this committee, and those reviews have not found what we did was improper.

Mr. Anastaplo: You mean—

Commissioner Stephan: I just want to state that for the record.

Mr. Anastaplo: You mean there has been one review.

Commissioner Stephan: Two. There have been two. The Supreme Court of the United States reviewed your request for review.

By Commissioner Bane:

Q. When you state you support the division of governmental powers into the executive, the legislative and the judicial, are you compromising, or do you wish to modify the previous statement which you have made that you are a believer in the tri-partite form of government that we have in the United States, with the powers divided into the executive, the legislative and the judicial?

A. No, sir.

Q. Are you a believer in the right of a citizen to rebel [fol. 98] or revolt against the decision, final decision of a competent tribunal, which is a part of the judicial system of the United States?

A. I assume the committee would not care to establish any foundation for that question?

Commissioner Bane: Mr. Chairman, I submit the foundation has been established by the witness's own statement with respect to whether people are or are not to be bound by judicial decisions. Consequently, I think the witness should be required to answer.

Mr. Anastaplo: I assume you would not have asked the question, except for my answer on that point?

Commissioner Bane: That is exactly right. Will you now answer?

Commissioner Stephan: I think the question is proper.

By Commissioner Bane:

A. Certainly. I think—none of us would be bound by every decision a court might hand down.

Q. How are you answering the question as to whether a citizen has the right to rebel or revolt?

A. I would say he has a right to rebel or revolt under certain circumstances.

Q. Did you get the question?

A. I answered it. I said yes, in certain circumstances.

Q. Would you answer it yes or no?

A. It is not capable of a yes or no answer. That is a problem with this committee. I cannot answer the question yes or no without—it is very easy to be misinterpreted otherwise.

Q. Bearing in mind your statement that you now without any mental reservation and will hereafter loyally sup- [fol. 99] port the Constitution of the United States—bearing in mind that statement, let me ask you whether or not you believe that the ultimate desirable form of government in the United States would be a dictatorship or a proletariat?

A. I think that the objection I previously raised applies here, and justifies my refusal to answer.

I am quite willing, Mr. Chairman, to add the others, if you would like to hear them. This is only one set of objections. There are more.

Commissioner Stephan: You may state them.

Commissioner Moses: May I suggest that the record be clear that he is refusing to answer the question, if he is refusing. He is making an objection, but he hasn't refused.

Commissioner Stephan: I think it would be helpful, when you refuse to answer a question, that you so state, so that your attitude isn't lost in the explanation that you give later.

Mr. Anastaplo: All right. I refuse to answer the question. I refuse partly because I think it is very much like the other questions about affiliations. I have already indicated my objections to the statutes and also to the inquiries themselves under the First Amendment.

I further object that the inquiries into affiliations or into these beliefs, do not come within the meaning of the term, "activities," referred to in the order of the Supreme Court of last year. That is, I think an attempt of the committee to fit these inquiries into that term is improper and a deliberate evasion of the rule of law. Similarly, I object that the committee is refusing to be bound by the rulings

of the Supreme Court of the United States in the *Konigsberg, Schware, Yates* and *Patterson* cases last spring.

Commissioner Stephan: What was that latter case?

Mr. Anastaplo: The *Konigsberg, Schware, Yates* and [fol. 100] *Patterson* cases. I could put the objections in the form of a motion. Let me make just one motion.

Commissioner Stephan: It is not necessary to make motions in response to—in answer to a question.

Mr. Anastaplo: Let me indicate that in interpreting the term "activities," I would point, among other things, to Mr. Rothschild's dissent last year, which the Court seems to have used in framing its own order. In the use of the term "activities" he very deliberately made, there is the clear elimination of the questions into affiliations, as well as this kind of inquiry we are now having.

Commissioner Stephan: I think we are all familiar with his dissent.

Mr. Anastaplo: I object, moreover, that these inquiries are discriminatory, thereby violating my rights to the equal protection of the laws, and to due process of law under the Fourteenth Amendment. So far as I know, it is not regarded as standard practice on the part of the committee.

I further object that these inquiries violate my rights to due process of law guaranteed by the Fourteenth Amendment, and I have thirteen specifications at that point.

1. They are made without any foundation for any such inquiries in any way suggested or established.

2. They are made without the specification of any charges and without any advance warning.

3. They are made in defiance of the order of the Supreme Court of Illinois in this matter.

4. They can reasonably be considered designed only for harassment purposes—for example, the questions about associations or organizations none of us has ever heard of before.

[fol. 101] 5. They amount to a capricious and unfair fishing expedition and seem to reflect standards that are vague, arbitrary, indefinite and uncertain.

6. No attempt has been made to show their relevance either to character and fitness in general, or to my matter in particular.

7. There has been no showing, nor can there be any showing, that these inquiries can have any reasonable relation to professional fitness or the sound administration of justice; that is, there is no indication made that these inquiries meet the test set forth in the *Schware* case, that there must be "a rational connection with the applicant's fitness or capacity to practice law."

8. Furthermore, there is no indication that these inquiries into possible affiliations or beliefs relate in any way to the criteria Justice Frankfurter refers to in the same case when he speaks of the "quantities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility that have throughout the centuries been compendiously described as 'moral character'." I make this point, Mr. Chairman, because these inquiries are about a theoretical matter that might come into existence at some time, not about my qualifications as they exist.

9. Furthermore, one should add to this list of ways in which these inquiries deny due process of law, the fact that there is no indication that the Attorney General's list—and this refers to the last question, and the references to Marxist-Leninist doctrine—on which these questions are based, has been tested in any court, devised by a competent judge, or prepared for the purposes of this committee, or is in any way relevant to the issue of one's qualifications for the bar.

[fol. 102] 10. The inquiries are unfair in that I am forced to object to and resist many questions the committee do not take seriously, thereby prejudicing myself in the eyes of the committee because I presume to match their judgment with my own.

11. The inquiries are also unfair in that they are irrelevant because neither an affirmative nor a negative answer to them on the basis of this record should have any adverse effect on character and fitness considerations, whatever the

committee may think of the organizations or the doctrines asked about.

12. Furthermore, the inquiries are into matters about which the committee has little doubt and are designed only to make an applicant stand by principles and thereby prejudice himself in the eyes of the unreflecting.

13. Finally, these inquiries deny due process of law by violating elementary rules of decency and fair play.

I further object that these inquiries violate those rights guaranteed to me by the *ex post facto* and bill of attainder clauses of the American Constitution. These inquiries are made without prior authorization or statutory definition. They are *ad hoc* in nature and designed only for me, and were decided upon only after this matter had arisen. Furthermore, an attempt to penalize the applicant for membership in any of these organizations inquired into or for belief in any of the doctrines asked about, would amount to an attainder.

Commissioner Bane: What organizations are you referring to?

Commissioner Stephan: May I ask a question? Are you taking a position in your testimony before this committee that we are restricted under the Supreme Court direction to inquiring into your activities only since your original [fol. 103] application was denied?

Mr. Anastaplo: I assume on the basis of the efforts to put—yes, I am, sir.

Commissioner Stephan: Are you aware of the fact—

Mr. Anastaplo: Activities, and the other two elements. Activities, present reputation, and something about the right of revolution.

Commissioner Stephan: Views with respect to the right of revolution, the overthrow of government by force.

Mr. Anastaplo: Mr. Bane has indicated that he had no intention of asking these questions until—

Commissioner Bane: That is about as absurd a misquotation as I have ever been subjected to.

Mr. Anastaplo: I am sorry, I had thought you had said you would not have asked the question about revolution or using force against the government—

Commissioner Bane: You don't even remember what the question is. I am not going to enter into an argument with you.

Mr. Anastaplo: I would like to be right on this point.

Commissioner Bane: I would like to proceed with the questioning.

Commissioner Stephan: The only point of my comment is to make it very clear, if you have a misapprehension on the point, that we are not restricted to questioning you on your activities only. We have been told by the Court that we are to look into your views on the right of revolution.

Mr. Anastaplo: I see. Is that then—does Mr. Bane's inquiry—

Commissioner Bane: I think it is also true that we are [fol. 104] entitled to explore into his answers on the questionnaire.

Mr. Anastaplo: The reason this misunderstanding came up is that I thought Mr. Bane had indicated that he would not have inquired into these matters relating to revolution otherwise, except for some answers I made. Now you seem to be suggesting that you were intending to inquire anyway, because the Supreme Court of Illinois directed you to.

Commissioner Stephan: That would certainly be a logical inference to draw, wouldn't it, if the Court told us to?

Mr. Anastaplo: Certainly.

Commissioner Stephan: Let's proceed.

Mr. Anastaplo: Then I should add that I have objections to the constitutionality of the Court's description of the areas to be inquired into, and I am prepared to read those, too.

Commissioner Stephan: Let's hold up a moment.

Mr. Anastaplo: Mr. Bane asked me one question I had not answered yet.

Commissioner Bane: I want you to be quite—

Commissioner Stephan: Just a moment.

I don't think it is proper at this time for you to state your objections to the Supreme Court's order. You are before us on the basis of the order. You are here because the order was made. If you have any objection at the end of the proceedings, we will entertain it then.

Mr. Anastaplo: Then will you simply note that I did have objections?

Commissioner Stephan: Yes, it is noted.

Mr. Anastaplo: Mr. Bane had a question—

Commissioner Bane: I would like to withdraw the question.

Mr. Anastaplo: I would like to answer it.

[fol. 105] Commissioner Bane: I withdraw the question.

Mr. Anastaplo: I would like to make a statement.

Commissioner Bane: Mr. Chairman, I would like to proceed.

By Commissioner Bane:

Q. Bearing in mind the provisions of the Federal Constitution defining and ascribing generally the powers of the executive and legislative branches of the Federal Government, I would like to ask you whether you consider that form of government preferable to government by presidium, such as exists in the Soviet Union?

A. I refuse to answer the question, on the same grounds that I have indicated.

Q. Are you modifying or withdrawing, in any sense, your answer to question 20, that you do now without any mental reservation and will hereafter loyally support the Constitution of the United States?

A. I am not. I have answered that question.

Q. Are you taking the position that having answered that question, this committee has no authority to inquire into any specifics or details concerning the meaning of your answer?

A. That is not what I am talking about. The position I am—

Q. What is your position?

A. The position I am taking is that the committee has no authority to use unconstitutional means to check—that is what I mean by that answer.

Commissioner Bane: I think that is all the questioning I have.

Mr. Anastaplo: May I make a statement, then, with reference to the various objections, relating both to or-

[fol. 106] ganizations and inquiries, simply on the basis of what was earlier said, that I would be permitted to incorporate these objections later on, and make it apply to both?

Commissioner Stephan: Which objections are you speaking of now?

Mr. Anastaplo: The rather extended list of objections I read to you.

Commissioner Stephan: I didn't fully get the significance of your comment. Will you state it again?

Mr. Anastaplo: The various objections I read to you, relating to the First and Fourteenth Amendments and other provisions of the Constitution, relate both to inquiries about affiliations that have been made and to the inquiries just now made with respect to the matters Mr. Bane was asking about.

May I state one further thing, Mr. Chairman, so that you will understand my position?

Commissioner Stephan: Yes.

Mr. Anastaplo: That is—I hope I am not seeming too persistent in making the objections I am making. The objections and the standards I am applying are not those created by or permitted by either the committee or me. That is to say, there is a body of law outside and above this committee to which I am deferring, and I must reluctantly, against the committee's wishes, perhaps, sometimes insist upon stating the objections, so that there will be no doubt about some of these comments that have been made at this stage of the proceedings.

Commissioner Bane: I would like, before I do sign off, to ask the applicant one further question. I want to ask you whether the objections to certain questions that I have asked you and which you have outlined in detail, whether you wish to have those objections stand also to questions 19 and 20 on the questionnaire, even though you have, in [fol. 107] fact, answered the questions in the questionnaire?

Mr. Anastaplo: No—19 and 20, I take it, were inquiries into my—would you please state what the inquiries are about, there?

Commissioner Bane: There is your questionnaire.

[The questionnaire was handed to Mr. Anastaplo.]

Mr. Anastaplo: Nineteen inquiries into the principles underlying the Constitution—

Commissioner Bane: I wonder if the record could show that the applicant has available to him his own questionnaire, and the answers?

Mr. Anastaplo: Nineteen inquiries into the principles underlying the Constitution of the United States and that of the State of Illinois. And twenty is to indicate whether I now without any mental reservation and will hereafter loyally support the Constitution of the United States and the Constitution of the State of Illinois.

Commissioner Bane: There is another part of question nineteen you didn't read.

Mr. Anastaplo: "State what you believe are some of the obligations of good citizenship."

I believe there is no necessity to apply to those, the objections I have made. And I might add, I have been eager to answer particular questions into those areas throughout my association with this committee.

Commissioner Bane: That is all I have.

Commissioner Stephan: Mr. Christianson has two questions he wants to ask the applicant and I am going to ask that he do that at this time.

[fol. 108] By Commissioner Christianson:

Q. There may be three questions. You have read Rule 58 recently; you are familiar with the rule?

A. I am somewhat familiar with it. I am not altogether familiar with it but I do know—I glanced at it, in fact, today.

Q. You read it today?

A. I glanced at it today.

Q. Assume that any member of this committee believes it necessary, in order for him to determine whether or not you are possessed of such moral character, moral fitness or good citizenship as would justify your admission to the Illinois Bar, that he ascertain whether or not you at this time advocate or believe in the overthrow of the government of the United States or the State of Illinois—based on that assumption, does a committee member have the right to interrogate you as to such belief or advocacy?

A. Are you asking me to define this committee's rights?

Q. I am asking you whether or not, for this purpose, the committee has a right to interrogate an applicant on his character and fitness?

A. I would answer by saying the committee has a right to make constitutional inquiries into this area.

Q. Your answer is neither yes nor no.

A. That is true.

Q. Assume no investigation has been made of you by any member of this committee, or anyone employed by it, and you are asked a question by the committee which, in the opinion of the committee—I use this language advisedly, because it is contained in Rule 58—relates to your moral character, moral fitness and good citizenship, but which does not directly relate to the committee's questionnaire or the answers thereto which have heretofore been filed by you—based on these assumptions, do you have the right to refuse to answer such a question?

[fol. 109] A. Would you read that question again?

Q. Yes, I will. Assume one, there has been no investigation made of you by any member of this committee or anyone employed by it, and, two, you are asked a question which, in the opinion of the committee relates to your moral character, moral fitness and your good citizenship, but which does not directly relate to the committee's questionnaire and the answers thereto which have been heretofore filed by you—based on these two assumptions, do you have the right to refuse to answer such a question?

A. This is a most remarkable change of position.

Q. There is no change of position at all. I am simply asking a question.

A. The reason I say that is that heretofore I have been admonished not to tell the committee what their business is.

Q. Well, you can see that sometimes the committee varies in its approach. We are fifteen individuals.

A. I would say I would have a right to object to certain questions of the kind that you indicated, on the basis of procedural considerations. Let me also add that I believe I would have the right to object to certain inquiries on the basis of the First Amendment considerations; and finally, I would have a right to refuse to answer questions that might even be within the power of the committee to ask. That is also possible.

Q. On the latter, on what grounds?

A. That is to say, the committee may have the power to ask certain questions—assuming I am wrong on the first two grounds, the committee may therefore have the power to ask those questions and I would have the power, or the right, under the First Amendment, to refuse to answer [fol. 110] them. And perhaps under the Fourteenth, also.

Commissioner Christianson: That is all.

Commissioner Rothschild: May I ask a question, Mr. Chairman?

Commissioner Stephan: Mr. Rothschild.

By Commissioner Rothschild:

Q. I gather from your answer to Mr. Christianson's question, and from a comment that you make at page 56* of the record, and again in your letter of March 3rd, that you now acknowledge or take the position that there may be questions that are relevant to our inquiry which you have the right to refuse to answer; is that correct?

A. That may be; that is possible, yes, sir.

Q. Well, I don't want to know whether it is possible.

A. That may be. I say it is possible.

Q. "I have insisted that perhaps not all relevant information is proper." That is—

Commissioner Moses: May I suggest that you indicate you are reading from the transcript, or whatever it is you are reading from, because it sounds like you are simply making a statement.

Q. (Continued) The statement I just read is from page 56 of the transcript of the last hearing, in which you said, "I have insisted that perhaps not all relevant information is proper." And on page 5 of your letter, you suggest that "there are criteria other than that of relevance."

A. Certainly, there are criteria other than relevance.

Q. I want to ask you whether you have the right, in your opinion, to refuse to answer any question which asks for information relevant to our inquiry into your character and fitness?

---

* Internal references to Transcript pages refer to numbers [side folios in brackets] in original record as filed, and coincide with printed pages 2 to 313, inclusive, of this record.

[fol. 111] A. Certainly.

Q. Under what circumstances?

A. Let me give you an example. Suppose I were asked about someone that I was associating with, about whether he was this or that. Suppose, also, it were a high, important military secret as to whether he was this or that; and that I would be bound to secrecy as to whether he was this or that. The relevance would not be the only criterion there.

Q. Can you give any examples that might be more closely related to the practical reality as we experience it in dealing with you?

A. I may have certain letters—

Q. We haven't asked you about them.

A. You asked for an example. I may have certain letters that would be relevant to the issue but there may be other considerations why these letters should not be introduced.

Q. Would you state—let me put it this way. In your opinion, is the question of communist affiliations relevant to our inquiry into views as to the overthrow of the government by force? I say "relevant," not "proper."

A. I think that one is basically irrelevant. As I indicated long ago, I do not think even where a person has had membership in the Communist Party, that he is thereby disqualified from practicing law.

Q. That is not what I asked you.

A. That is the basis of my position.

Q. Do you care to answer my question?

A. Certainly.

Q. You haven't. In your opinion, is membership in the Communist Party—the question of membership in the Communist Party relevant to an inquiry into an applicant's—relevant to an inquiry into views of violent overthrow of the government?

[fol. 112] A. No, more relevant than the question of membership in the Democratic Party, or the Republican Party. Does the committee consider those relevant? I don't consider them relevant to your purposes.

Commissioner Thomas: Did you say you don't think they are relevant, or irrelevant?

Mr. Anastaplo: I don't think inquiries into such organizations are relevant.

By Commissioner Rothschild:

Q. Let me ask you one more, then. Are inquiries into your beliefs as to the writings of Karl Marx relevant to an inquiry into your views as to the violent overthrow of government?

A. No; there is a more direct approach. I think they are irrelevant.

Q. I am not asking you whether it is the best way to approach it.

A. They are not relevant. Part of the reason they are not relevant is, there is a constitutional approach.

Q. Would you define "relevance" for me?

A. "Relevance"? Certainly. Relevance means that it relates to the constitutionally permitted purposes of this committee. You cannot avoid the Constitution, Mr. Rothschild, in these matters. And that is why I have to keep repeatedly going back to it.

Commissioner Stephan: Are you through?

Commissioner Rothschild: Yes.

COLLOQUY BETWEEN COMMISSIONERS AND PETITIONER

Mr. Anastaplo: In this connection could I make a correction in the record that I think is relevant to your present concern?

Commissioner Stephan: A correction in something you testified to?

[fol. 113] Mr. Anastaplo: Yes, a correction we checked earlier this morning, with the tape, on page 49.

Commissioner Stephan: Yes, go ahead.

Mr. Anastaplo: At the bottom of the page, you see where it says there, "I could prove to you, or try to prove, on very high authority, that no one ever thought I was a communist. That is a quotation which I believe is accurate." Then it should be, "If this committee wants that evidence, comma, which I think shows something about the good faith of these inquiries, the purpose of them, comma, I am will-

ing to proceed to establish that evidence." I meant there, establish it by particular means.

May I make one more correction, so there will be no misunderstanding?

Commissioner Bane: May I ask who was with the applicant when he checked the tape?

The Reporter: I was.

Commissioner Bane: And was it clear that the correction was proper?

The Reporter: Yes.

Mr. Anastaplo: I have a number of corrections or amplifications.

Commissioner Stephan: I suggest you submit those in writing.

Mr. Anastaplo: Some of them you may want to ask questions about.

Commissioner Stephan: Submit them in writing.

Commissioner Bane: Are they second thoughts?

Mr. Anastaplo: They are not second thoughts; they are corrections, such as on page 63, you see there in the middle of the page, where it says, "I do not want it to seem that this comment that I quoted came from someone who did not know what this was all about. It came to me directly [fol. 114] from a member of the Court that wrote the opinion in my case." There is no comma after "Court" in that sentence and the word following should be "that" instead of "who." That is to say—I want to stress this—there is no attempt there to identify the individual from whom the information came, which was incorporated in a document, other than by saying he was a member of the Court from which this opinion came.

Commissioner Bane: I am not clear whether the witness is now changing things that he said, or whether he is suggesting that the transcript be changed to conform with what he claims he actually said.

Mr. Anastaplo: The latter is true.

Commissioner Stephan: You are saying the transcript is erroneous?

Mr. Anastaplo: It is erroneous, and the lady and I checked it this morning.

Commissioner Stephan: I think corrections you want to suggest in the record should be made in writing.

Commissioner Bane: And I think Mr. Anastaplo should make it clear whether he is correcting what he thinks he said, or suggesting changes.

Commissioner Stephan: I suggest this procedure to you, Mr. Anastaplo. You will get copies of the transcript after each hearing. You read the transcript and you submit, in writing, corrections that you suggest. Those will be passed on by the committee, not by dealing directly with the stenographer.

Mr. Anastaplo: I dealt with Mr. Cain, or through a representative of his.

Commissioner Stephan: If it is all right—

Mr. Anastaplo: I wanted to make the first one because of Mr. Rothschild's inquiry, and the second one because I did not want it to seem I was identifying any member of [fol. 115] the Court. I am especially desirous that this be taken care of.

Statement by Commissioner Stephan and Colloquy With Petitioner

Commissioner Stephan: In about ten or fifteen minutes we are going to adjourn, because of commitments of various committee members. Before we do, I would like to make a statement which I would hope would to some extent clarify the committee's position and perhaps make it easier for you to respond to future questions.

You know by now, Mr. Anastaplo, that one of the matters that the committee has given considerable consideration to is your possible membership in the Communist Party. You have been asked that question; you have refused to answer it. I think it would be unfortunate if we had some semantical difference as to what we mean by a member of the Communist Party. I think it is important for you to know what we mean when we ask the question.

Now what I mean when I ask the question is this: By a communist, I mean a member of the Communist Party; I mean a person who is a disciplined, active member of that Party; I mean a person who believes in communist doctrine and communist goals. Among these are class warfare, putting an end to representative government, putting an end to civil liberties, suppressing religion, in effect destroying

constitutional government as we know it in this country. These goals are accomplished by force, when necessary, by fraud, by subversion. If they cannot be accomplished by fraud and subversion, they will be accomplished by violence as soon as it is expedient to use violence. Peaceful, democratic, constitutional avenues for attaining these goals are not utilized.

Now, assuming when we ask the question that that is the kind of communist we have in mind, I want you to understand the difficulty that the committee finds itself in. To many of us, it is a difficult task, if not an insuperable one, [fol. 116] to reconcile taking the oath to support the Constitution of the United States and the Constitution of the State of Illinois, with adherence to any such doctrine. I would say that is an essentially important issue in this proceeding. To us, there is a contradiction on the one hand in saying that you support the Constitution of the United States—I am not talking about you, I am talking now, generically—that an applicant say he will support the Constitution of the United States and the Constitution of the State of Illinois, and at the same time be imbued with the views, the program, the goals that I have attributed to a communist. A great many of us have difficulty in seeing how such an oath could be taken in good faith.

Now the Supreme Court of the United States has said that the Communist Party is not a true party in any accepted sense of the word; that it is a conspiracy to overthrow this government and any other government that gets in its way. The Congress of the United States has made such a finding. Many of the State Supreme Courts have made such findings. So to us, there is an essential incompatibility between membership in the Party and the ability to take the oath properly. Do you understand that position?

Mr. Anastaplo: Yes, sir. May I say something?

Commissioner Stephan: I am not finished.

Mr. Anastaplo: I'm sorry.

Commissioner Stephan: Now you have asked for a warning when we put a question to you that we think is a pivotal, important question in connection with your qualification. I must tell you that we consider that question, "Are you a member of the Communist Party," such a ques-

tion; and that the refusal to answer it may have serious consequences to your application. I am not pre-judging you in this regard, and I haven't the slightest idea how any other member of the committee is going to vote on this proposition. I have not, for that matter, made my own mind up as to how I am going to vote. But I can see that it would well be an important question in dealing with your qualification. I want you to understand that. That is [fol. 117] not a frivolous position. I think it needs to be treated very seriously.

Do you want to make some statement?

Mr. Anastaplo: Yes, I would like to find out exactly what this entails. You are not suggesting that refusal to answer that question would *per se* block my admission to the bar?

Commissioner Stephan: No, I am saying your refusal to answer that question as to whether you are a member of the Communist Party, could and might

Mr. Anastaplo: I see.

Commissioner Stephan: To us, it is relevant to your character and fitness. If you should answer the question "yes," I am not at all sure that would end the inquiry. I think if you should answer it "yes," the committee should be entitled to probe further and find out what kind of Communist Party member the applicant might be, whether he is an active member; whether he is a dues-paying member whether he is a policy-making member, whether he is an officer in a local group, or just what he is. So I would point out the seriousness of that issue to you at this time.

Mr. Anastaplo: I assume that the committee does not care to state why this is a particularly serious issue with respect to me? I mean—I notice you say nothing about the Ku Klux Klan or the Silver Shirts of America, about which you have also asked with the same amount of emphasis up to this point, and which I have refused to answer for the same reasons. Would you care to indicate why you say this about this question and not about the other ones?

Commissioner Stephan: I think there is an easy answer to that. This committee has not come into being—this committee cannot completely ignore the history of this proceeding.

[fol. 118] Commissioner ———: But the history includes that question, and that question has been before two of the high courts of the country.

Commissioner Stephan: Whatever the relevance of other questions, we consider that one quite relevant.

Mr. Anastaplo: May I also note that the previous proceeding included questions about Communist Party affiliations and Ku Klux Klan affiliations?

Commissioner Stephan: I don't mean to indicate by my statement that some of these other questions about membership in subversive groups do not have relevance. I think they do. I am trying to give you the sentiment of members of the committee on this very important point.

Mr. Anastaplo: But you do not care to distinguish one from the other, or explain why you distinguish one from the other?

Commissioner Stephan: Are you talking about the organizations that Mr. Bane questioned you about?

Mr. Anastaplo: The Ku Klux Klan, Silver Shirts of America, and this one.

Commissioner Stephan: You were also questioned about affiliations with organizations in the past, or at least some of them.

Mr. Anastaplo: That is true. And if the criterion is, that this has been asked about before, the Ku Klux Klan seemed to qualify as much as the Communist Party for your information.

Commissioner Sawyier: May I ask a couple of questions?

Commissioner Stephan: I would like to go on, if I may, and we have only a few more minutes, and we will have another hearing.

[fol. 119] Let us assume that from extrinsic evidence and not from anything that an applicant told us, we found out—and I am not suggesting we have found this out about you by any outside evidence—but let us assume by extrinsic evidence we found out that a person was the kind of communist I have just described, and let us say that that evidence was credible. Is it your view that this committee should pass such a person for admission to the bar—such a member of the Communist Party?

Mr. Anastaplo: And you include—I am sorry, I have forgotten—

Commissioner Stephan: I included adherence to traditional Communist Party doctrine and adherence to the Communist Party goals I mentioned.

Mr. Anastaplo: I cannot simply apply, on traditional—

Commissioner Stephan: He is a person who believes in class warfare, who believes in the destruction of constitutional government, he believes in the abolition of private property, the suppression of religion, he follows a line dictated by a foreign government, and, if necessary, he will accomplish his goals by violence. Let us assume we have credible proof of such views by an applicant from an outside source. Would you say that we should or should not admit such a person to membership in the bar?

Mr. Anastaplo: I would not care to make a judgment simply on that because these things seem to me, as you relate them, largely theoretical and have no application to one's daily life.

Commissioner Stephan: I said he was an active member of the Communist Party.

Mr. Anastaplo: Yes, but you proceeded to indicate what that activity refers to, in terms of very long-range goals [fol. 120] that the Communist Party is assumed to have. And that would not be sufficient. A man may believe in an organization that intends some day to punish the wicked, reward the good, destroy the earth, remove all constitutional government from this earth. That is a church organization, and that may be just as farfetched as the communist one.

Commissioner Stephan: Are you attempting to say that even though a man has these goals, and is actively working towards them with others, that in determining whether he should be admitted to the bar we should first decide whether those goals are likely to be accomplished immediately or whether they are long term?

Mr. Anastaplo: That would certainly be a relevant consideration.

Commissioner Stephan: Are you thinking about clear and present danger problems; is that the point you are making?

Mr. Anastaplo: That, of course, may be related. I am mostly thinking about a reasonable evaluation in the matter. That is to say, a man who believes in the kingdom of

the proletariat and a man who believes in the Kingdom of God Upon Earth, may both be visionaries, whose actions and goals have no immediate relation to everyday political life and work as a member of the bar.

Commissioner Stephan: The kind of man I have described—would you say he is bent on destroying constitutional government, as we know it? Let's not get into the question of when he can do it or when he and his fellows can accomplish it. Would you say he is bent—

Mr. Anastaplo: He may be bent upon putting in a substitute for it. But that in itself is not—

Commissioner Stephan: I say, bent on destroying it as we know it today,

[fol. 121] Mr. Anastaplo: I would say no, not necessarily. That is why I would have to inquire more about him.

Commissioner Stephan: I say, he wants to put an end to representative government and he believes in dictatorship of the proletariat. Wouldn't you say he plans to put an end to representative government as we know it?

Mr. Anastaplo: I am saying that that may be part of a long-run theoretical goal.

Commissioner Stephan: Let's assume it is. Can you say such a man can take the oath to support the Constitution of the United States and the Constitution of the State of Illinois?

Mr. Anastaplo: Certainly, as much as to say a devout Christian can take the oath to support the Constitutions of the United States and Illinois, even though he is bent by his efforts on establishing the Kingdom of God on Earth.

Commissioner Stephan: Don't you think when you swear to support the Constitution of the United States and the Constitution of Illinois that you have a belief in a certain minimum amount of representative government, a certain minimum amount of civil liberty, a certain minimum amount of power reserved to the people?

Mr. Anastaplo: Certainly, and both Christians and communists do, perhaps; they may have that belief [in representative government] in the practical and immediate future. That is why I do not think that one can make a judgment beforehand, before he knows more about the situation.

Commissioner Stephan: So you are saying you see no essential incompatibility in being an active, disciplined, militant Communist Party member, and the taking of the oath required of Illinois attorneys?

Mr. Anastaplo: Not necessarily, yes, sir. And furthermore, sir—

[fol. 122] Commissioner Stephan: Excuse me just a moment.

Mr. Anastaplo: May I also add, sir, and I may be completely wrong about this, but I would insist that these opinions I am now expressing, would have no bearing on my character and fitness.

Commissioner Stephan: We have come to a point now where we are going to have to adjourn. Will you wait just a moment until we can decide on an adjourned date?

[Discussion was had, stated to be off the record.]

Commissioner Stephan: We will go back on the record. We will meet again on Monday, April 7th, at one o'clock.

Mr. Anastaplo: May I ask a question for the record?

Commissioner Stephan: Yes.

Mr. Anastaplo: I have here some material that I thought might be beneficial to look at between now and next time.

Commissioner Stephan: What is it?

Mr. Anastaplo: It is material which incorporates my position and which indicates the over-all tenor—

Commissioner Stephan: He wants to hand us some material to consider before the next hearing.

Mr. Anastaplo: —which places my entire position in context and indicates it is part of an entire and reasoned whole. Two of them are letters to a member of the Supreme Court of Illinois, without identifying recipient, the dates being May 6, 1955 and July 14, 1955; one being a letter to the Chicago Daily News relative to the Chicago Crime Commission investigation, which prompted me to make the reference earlier as an example of what Mr. Bane was asking me about.

Commissioner Bane: Who is the writer of that letter?

[fol. 123] Mr. Anastaplo: I am. I will identify it. It is dated 5 August 1952, to The Editor, the Chicago Daily News. The third is a letter to the New York Times dated March 28, 1954. All three are designed to give some idea

of my over-all position and to indicate that the position I am taking here, is not capricious or arbitrary, but part of a reasoned whole.

Commissioner Stephan: I will ask the Secretary to have these documents reproduced and sent to committee members.

Commissioner Bane: And in the meantime there is no ruling on their admissibility.

Commissioner Stephan: No ruling, and we will pass on them next time.

Mr. Cain: I will circulate them.

Mr. Anastaplo: I should like to have them ruled on before they are examined.

Commissioner Stephan: Are you offering them as evidence or for examination?

Commissioner Thomas: There can be no ruling.

[The hearing recessed at two fifty-five o'clock.]

[fol. 123a]

6030 Ellis Avenue
Chicago 37, Illinois

27 March 1958

[Stamp—Received Apr 1 1958 Char. & Fit. 1st Dist.]

Mr. Richard H. Cain, Secretary
Committee on Character and Fitness
29 South LaSalle Street
Chicago 3, Illinois

Dear Mr. Cain:

In accordance with the evident wishes of the Committee that I present my corrections to the transcript of the first session of February 28 in writing rather than when I am before them, I shall do so at this time. I will take this opportunity to amplify my remarks where necessary in order that my position might be clear and to send along with this letter documents or information requested or mentioned by the Committee at the February 28 meeting. I should like to have this letter entered on the record, and am willing to have both this letter and that of March 3

sworn to during my scheduled third appearance before the Committee of April 7. I hope to be able to provide a similar set of the more important corrections immediately apparent to me when I receive the transcript of our second meeting of March 21.

There are fifteen items with respect to which correction or amplification is desirable. With the exception of the first two, they will be presented in the order in which they appear in the transcript of the meeting of February 28. (I am sending to the two members of the Supreme Court of Illinois involved copies of this letter in order that they might have the relevant corrections to the portions of the transcript promised them in the next-to-last paragraph of my letter to the Committee of March 3.)

Item 1 (page 63). The uncorrected text reads, "It came to me directly from a member of the Court, who wrote the opinion in my case." This refers to the information, "No one ever thought you were a Communist"—information which is incorporated in the document first mentioned at page 50. As I mentioned at our March 21 meeting, a member of the Committee staff, who is one of the Chicago Bar Association reporters assigned to report this matter, listened with me to the tape at this point. (We have checked the tape only at three principal points.) As I had anticipated, the version in the transcript is incorrect: the "*who*" should be a "*that*". Thus, instead of identifying the source of the quotation as the Court member who signed the opinion, I am identifying my source only as a member of the Court which handed down the decision and opinion in my 1954 matter. I request that the Committee agree to correct all existing and future copies of the transcript so that there will be no misunderstanding: I trust the Com-

[fol. 123b] mittee will grant that I have been careful not to introduce into my testimony in any way the names or identities of any of the members of the Supreme Court of Illinois.

Item 2 (page 49). The uncorrected text reads, "This committee once had evidence which I think shows something about the good faith of these inquiries, the purpose of them. I am willing to proceed to establish that evidence."

Once again, a Committee reporter and I checked this portion of the tape and have corrected it so that the entire passage reads as follows (the underscored portions indicating corrections),

> ". . . I could prove to you, or try to prove, on very high authority, that no one ever thought I was a communist. That is a quotation which I believe is accurate. If this committee wants that evidence which I think shows something about the good faith of these inquiries, the purpose of them, I am willing to proceed to establish that evidence."

Contrary to one commissioner's suggestion, at page 47, I submit that my offer of evidence to the effect "that the committee has very little doubt about the answer to the question" of whether I have ever been a Communist, in no way assumes either that this question is relevant to the purposes of the Committee or that I am willing to answer that question. In fact, this offer of evidence points to the fundamental irrelevance of the Committee's question. That is, this evidence was intended to record a fact which, as I point out at page 47, "has a bearing upon the purpose of the committee's question, upon the good faith of such questions, upon the relevance of the question, and upon the significance of a refusal to answer the question." This is the fact of what the Committee on Character and Fitness and the Supreme Court of Illinois thought was the answer to the question, "Are you now or have you ever been a member of the Communist Party?"

It is necessary to emphasize this point because of the commissioner's remark, at page 50, about the "best evidence rule." It may be true that "the best evidence as to whether I am or am not a member of the Communist Party" might come from me. But it was not the purpose of the evidence I brought forth (i.e., the evidence incorporated in the document first mentioned at page 50) to establish whether I was or was not a member of the Communist Party, the Ku Klux Klan, the Silver Shirts of America, or any other organization. Rather, this evidence was advanced, for the reasons I have just stated, to show what the Committee and the Court, correctly or incorrectly, thought was the

case—and for this purpose, that was the best evidence *I* had available. In the light of such evidence, of course, the entire line of inquiry pursued by the Committee with respect to such matters in my matter becomes even more suspect than it had already seemed. (See, also, Item 13, below.)

Item 3 (page 8). The commission in the United States Air Force Reserve terminated April 12, 1953. The "age prob-

[fol. 123c] lem" I refer to is simply a realization that my further usefulness as a flying officer was drawing to an end because of age. Besides, I would probably be used in any further service in capacities for which I have been trained since my World War II active duty. For various reasons, I wanted to remain free to negotiate with respect to such matters. In any event, the commission was retained until the end of the Korean War, at which time the Air Force was tendering new indefinite appointments.

Item 4 (page 12). The note-taking for one of the students for a fee was, it should be noted, with the knowledge of the law school administration and pursuant to a special arrangement with the Veterans Administration, inasmuch as the student had a service-incurred disability.

Item 5 (page 13). The uncorrected text reads "*imagined*", when it should read "*management.*" It was partly because of this work of preparing training courses for management personnel in various industrial concerns, which was referred to in the recommendations accompanying my application to the foundation, that I received the summer fellowship award from the Foundation for Economic Education (page 17).

Item 6 (page 21). I am providing for inclusion in the record the text of the letter to the student newspaper of the University of Chicago here testified to. This letter appeared in the University of Chicago *Maroon* of May 8, 1953. Although I had no part in organizing the student demonstration with respect to proposed curriculum changes that was carried on about this time (page 20), or even in arranging for the "participation" therein of my three-year old daughter (page 22), I suggest participation or non-

participation is really irrelevant to this matter, in that this demonstration was as innocent on the University of Chicago campus as a football rally would be at other schools.

Item 7 (page 22). Partly in order to dispel any lingering suspicions there may be on the part of any member of the Committee, I am also providing for inclusion in the record a copy of a photograph of my daughter as it appeared in some Chicago papers, accompanying reports of the student demonstration. (An original which I later secured from one of the newspapers is available to the Committee for inspection.) The students participating in this afternoon rally had taken the position that the proposed changes in curriculum would damage seriously the college plan established under Chancellor Hutchins's regime. It was to dramatize this idea that some enterprising student fastened to my daughter's back the placard which read, "College Wait For Me!"

I suggest, by the way, that the Committee's interest in the relatively trivial matter referred to in Items 6 and 7 may indicate they really have no basis for questioning the *prima facie* case established by my application and various character references.

—4—

[fol. 123d] *Item 8* (page 24). In response to questions about my writings in the last ten years, I indicate at this point in the record that I could remember having published only the two book reviews which appear in the Fall 1954 and Winter 1954 issues of *The Lawyers Guild Review*. Since the hearing of February 28, I have come across a long letter to the editor published April 27, 1951, in the Carterville (Ill.) *Herald*, and entitled by the publisher, "George Speaks for India." I am submitting the two book reviews for inclusion in the record, partly as evidence of my interest in and approach to problems of legal ethics and of the legal profession. A copy of the letter which appeared in my home town paper, corrected for typographical errors, is also submitted at this time.

Finally, to complete my answer to the Committee with respect to publications, I should note that I was a member of the Symposium Planning Committee that conceived the idea of and helped carry into realization the Spring 1951

issue of the *University of Chicago Law Review*, which was entirely devoted to a study of Congressional Investigations.

Item 9 (pages 26-27). With respect to my first appointment as an election judge, I still do not recall who was with the lady who needed an election judge and who recommended me to her. I believe my sponsor was someone who knew me as an associate at The Industrial Relations Center, where I was then employed. Subsequently, I was asked to serve by precinct captains or others who had either seen me serve or heard of my previous service.

Item 10 (page 28). I believe I can now state with some confidence that my first service as an election official was Registration Day, October 9, 1956, with canvassing duties for two days thereafter. Then I served in the 1956 presidential election. I believe I have served in every election since.

Item 11 (pages 30-31). With respect to the concern expressed by a member of the Committee about the fact that I might have on different occasions served as both Republican and Democratic election judge, I should like to advance the conjecture that the policy behind the election law is that the party-designation aspect is taken care of primarily by leaving it to the local party officials to decide whom they want to serve as election judge. That is, the partisan officials seem to have the right to nominate whom they want, so long as the nominee for the post has not voted within a certain number of months in the primary of the opposition party. In any event, there seems to have been no concern by the precinct captains involved that I would not act fairly, whichever party I might nominally represent at a particular election.

Item 12 (page 49). The tape at this point provides a correction: the passage should read, with the correction consisting in the underscored words,

> [fol. 123e] "I mentioned Mayor Daley. I assume—at least I was speaking of him in his nonofficial capacity, that is, a man with some prestige and power in the Democratic Party in the City. If I were closely associated with him, a question such as this would be rather

> natural, as well as, "What is your religion?", because we know how tickets are lined up sometimes according to religion, and so forth. I mean, in matters like this, under circumstances like that, it might be appropriate. But these are essentially private matters. Not the office —I am not claiming the judge is a private office—but the relationship. And I would also add that it isn't a matter of the power of the State being brought to bear to establish a certain kind of conformity."

Item 13 (page 54). After the Committee had ruled that they would not ask me to submit the document referred to in Items 1 and 2, above, I made the prediction, ". . . it is a document you will hear more of later . . ." May I illustrate what I mean by this? I have testified to the fact that some member of the Supreme Court of Illinois had told me, "No one ever thought you were a Communist." This evidence is incorporated in the document here referred to. The unwillingness of the Committee to challenge my testimony suggests that there is no reason to doubt the accuracy of the justice's report on what "no one thought." This suggestion is further supported by the statement in Commissioner Rothschild's dissent last year in my matter, ". . . it should be noted that neither at the time of its original action in 1951, nor at this time, does the Committee have any substantial evidence or suggestion of evidence that the applicant is or ever was a Communist." Does not all this cast serious doubt upon any claim the Committee might make that it might be necessary, in order to pass on my character, fitness, or ability to take the constitutional oath in good faith, to ask questions about possible Communist Party affiliations? The Committee have yet to explain why they disregard the overwhelming case indicated in the record and devote themselves as much as they have to inquiries which are questionable in *any* matter and which the documents here referred to suggest *they* themselves must regard as pointless in *this* matter.

It should be noted, as I did in my letter to the Committee of March 3, that it is not necessary to my argument here that the document first mentioned at page 50 should be introduced in evidence. All that was necessary was my

testimony that a member of the Supreme Court of Illinois had informed me, subsequent to the 1954 opinion in my case, "No one ever thought you were a Communist." And I once again note that I myself am not testifying to whether I am or am not a member of the Communist Party, the Ku Klux Klan, the Silver Shirts of America, or any other such organization, but only to information which calls into question the good faith and relevance of such inquiries by the Committee in this matter.

—6—

[fol. 123f] *Item 14* (page 58). I am providing for inclusion in the record an excerpt from the *Northwestern University Law Review* article referred to here. The passage is from Note 6, of an article entitled, "The Illinois Bar and Individual Freedom," *Northwestern University Law Review*, March-April 1955. In addition to the purpose here stated, this item bears also upon the issue of my reputation, as well as speaking to the problem of the reason why my affiliations were ever inquired into in the first place—that is, it speaks to the problem of the sequence of inquiries that were put to me.

Item 15 (page 61). I had complained at this point in the hearing that the Committee had failed to supply me documents and information that I thought I was entitled to, including the report of an investigator who visited my home town to make inquiries about me. (page 60) I should now like to comply with the request by a Committee member that followed my complaint, "Will you furnish us with references in the transcript or what evidence you have of those requests [for an investigator's report]?" References include,

a. U. S. Supreme Court Record, *In re Anastaplo*, p. 83 (letter to the Committee, October 27, 1952);

b. U. S. Supreme Court Record, p. 83 (letter from the Committee Secretary denying request for Investigator's Report, 30 October 1952);

c. Applicant's Brief, Supreme Court of Illinois, September 26, 1953, pages 26-27, 105, 106;

d. Applicant's Reply Brief, Supreme Court of Illinois, May 7, 1954, page 4;

e. Applicant's Oral Argument before the Supreme Court of Illinois, May 12, 1954;

f. Applicant's Jurisdictional Statement, U. S. Supreme Court, January 11, 1955, page 9.

Other references to this Investigator are to be found at pages 110-111, and 112 of the U. S. Supreme Court Record. Finally, there is the passage at pages 11-12 in the brief I submitted to the Supreme Court of Illinois September 26, 1953, which describes the Investigator in some detail:

> "During the five-month period [in 1951] between the Second Hearing and the Committee decision, Mr. John K. Feirich, an attorney in Carbondale, Illinois, and a member of the State Board of Bar Examiners (and thereby an ex officio member of the Committee on Character and Fitness in his Appellate Court District) appeared in Carterville, Illinois, the Applicant's home town (2900 population) on at least two occasions. Mr. Feirich was understood by the townspeople with whom he came into contact to be there in an official capacity for the purpose of making inquiries of the Applicant's fellow citizens about his character and fitness so that the information obtained could be relayed to the Character and Fitness Committee sitting in Chicago for its consideration. It is likely that the information thereby acquired (even though the informants knew that the applicant had been delayed in his induction

> [fol. 123g] into the bar) portrayed the applicant in as flattering a light as do the various affidavits that had been submitted to the Committee. The Applicant has attempted on several occasions to secure a copy of the report submitted by this Investigator (e.g., R. Appendix B, 2, 3), but without success. The Record, therefore, must remain incomplete until such time as the Committee sees fit to or is directed to supply the report."

I am still of the opinion that the Committee should then have stated—and that they should now stipulate—that such investigations have been made and that the record is

highly favorable with nothing adverse in the ordinary sense of character and fitness.

Item 16 (page 71). Finally, I hope I may leave open the question of who proposed marriage to whom. In the interest of domestic tranquillity, some accommodation is, I trust, understandable.

II.

I should now like to say something more about the three documents submitted to the Committee in the confusion at the close of the meeting of March 21. The documents are,

a. a letter to The New York *Times*, March 28, 1954, in which I urge that Senator McCarthy be treated fairly in the then-forthcoming McCarthy-Army Hearings by being permitted to cross-examine witnesses appearing against him;

b. a letter to The Chicago *Daily News*, August 5, 1952, criticizing the then-proposed financial questionnaire for all Chicago policemen, on the ground that it constituted a disregard for the constitutional rights of policemen;

c. two letters, May 6, 1955 and July 14, 1955, to a member of the Supreme Court of Illinois, setting forth my suggestions for the improvement of bar admission procedures and standards in Illinois. (Since it is inconsequential for present purposes to whom these letters were addressed, all identifying information with respect to the addressee have been omitted from the copies supplied to the Committee.) These unpublished letters not only spell out my position on inquiries into political and quasi-political affiliations and associations, as well as my position on the requirements of fair play and constitutional government, but these letters also indicate that the approach I am taking before the Committee is not simply unrealistic or altogether quixotic. For these letters, I suggest, point to a reasoned, consistent and realistic alternative to the kind of examination to which I have been and am now being subjected.

I should be glad to discuss this point, as well as the others made in this letter, at our meeting of April 7. I hope,

through these letters I can contribute to a clarification of what the issues are *and are not* in this matter.

—8—

[fol. 123h] III.

Important to the overall position I am taking before the Committee are the various objections I insisted upon noting for the record during our meeting of March 21. The objections I made, drawing on the First and Fourteenth Amendments as well as on the *ex post facto* and bill of attainder clauses of the American Constitution, bear on the issue of my character and fitness and on the significance of my refusals to answer certain inquiries.

It was necessary that such objections be stated, partly because the Supreme Court of the United States has indicated that the reasons why an applicant refuses to answer inquiries may be relevant and important in passing upon his character and fitness. In addition, I had hoped that the Committee might cut off certain inquiries which I anticipated might come, and which in fact followed. It should be realized that it is prejudicial to me to have to resist even clearly improper inquiries on the part of the Committee, if only because the Committee are not accustomed to such a reliance upon personal judgment on the part of applicants appearing before them.

Furthermore, I should like to have had the Committee rule on the motion which I was precluded from making, a motion that I now put to the Committee:

> I move that the Committee now rule, on the basis of the objections I have raised, that my responses or lack of responses, at any time in the course of this rehearing, to the inquiries about affiliations as well as to the inquiries about "Marxist" or "Leninist" doctrines, should have no adverse bearing on my application. I further move that the Committee rule that no further inquiries into affiliations be permitted or any other inquiry related thereto.

If the Committee had permitted me to make this motion along with the supporting objections at the start of the March 21 meeting, and if they had ruled as requested, there

could have been avoided much of the inquiry that followed. For various reasons, the best point at which to cut off such inquiry was at the very beginning of the hearing.

The various considerations referred to in this letter take on even greater significance when one realizes the extent to which the Committee are deliberately ignoring the directive of the Supreme Court of Illinois of September 17, 1957. I have already indicated that the Committee interpretation of the term "activities" is strained and inappropriate. May I also call your attention to page 5 of Commissioner Rothschild's dissent of last year? It is evident that the wording of the critical passage in the Supreme Court order (including the term "activities") is

—9—

[fol. 123i] taken, for the most part, from this part of Mr. Rothschild's dissent. Yet it is clear that certain inquiries, particularly those with respect to affiliations, are explicitly excluded from these terms as used by Mr. Rothschild (which are adopted by the Supreme Court).

The basic issues, legal and otherwise, as I see them, are relatively clear. It is even obvious, I submit, that there really is no serious question that I have the minimum qualifications required for admission to the bar and for the practice of law. Why the Committee will not concede the obvious raises problems that I should sometime like to speak to. These are problems that only political philosophy can properly address itself to. These are problems with respect to which one may even be obliged to rely upon certain ancient philosophers for an adequate discussion. The Committee have very clearly indicated they want "to dispense, as much as we can, with argumentation or dialectics, unnecessary discussion." May I simply be permitted to remark at this time that the ancient discussion on these matters began with observations on the distinctions between the "few" and the "many"? Such a discussion might even lead to the curious conclusion that someone could be considered too fit to practice law.

But, setting aside for the moment forbidden discussions, is one not obliged, in the interest of good advocacy and judicial integrity, to resist strenuously, even at the risk of incurring official displeasure, unconstitutional disregard of

the rule of law? May not, in fact, such resistance reflect the best traditions of the bar and thereby provide the best evidence that a character committee can desire with respect to an applicant's qualifications for the practice of law?

Respectfully yours,

/s/ GEORGE ANASTAPLO
George Anastaplo,
Counsel *pro se*

Enclosures (6)

[fol. 124]

BEFORE THE COMMITTEE ON CHARACTER AND FITNESS

FIRST APPELLATE COURT DISTRICT OF ILLINOIS

SITTING AS COMMISSIONERS OF THE
SUPREME COURT OF ILLINOIS

In re: GEORGE ANASTAPLO (Session III)

Proceedings: April 7, 1958

Reported by: Mabel A. Lesser

Present:

Commissioners James P. Carey, Jr., J. R. Christianson, James E. Hastings, George N. Leighton, Walter H. Moses, John M. O'Connor, Jr., Edward I. Rothschild, Calvin P. Sawyier, Francis J. Seiter, Len Young Smith, Edmund A. Stephan, D. Robert Thomas, Jerome S. Weiss, Horace A. Young.

*****

Richard H. Cain, Secretary.

*****

Commissioner Stephan: Good afternoon.

This proceeding will come to order, please.

There are a few procedural matters, Mr. Anastaplo, that we want to clear up with you. You have submitted to the committee a letter dated March 27, 1958, in which you ask that certain errors in the transcript be corrected and in which you also amplify on some of the statements

you made in oral testimony at our last hearing, and further, in which you introduce some entirely new ideas into the transcript.

We feel that in the interest of an orderly procedure, [fol. 125] you should sit down with the subcommittee and take care of the mechanical errors in the transcript at that time. We will give you an opportunity to do that.

As for any additional matters that you want to introduce into evidence, or any additional statements that you may wish to make, any objections that you ultimately may wish to direct at the proceeding itself, you should do that at the close of the formal questioning, and you will have ample opportunity to do that

Secondly, you have made a motion at page eight in this letter that I refer to, as follows: "I move that the committee now rule"—I assume you mean you want us to rule today.

Mr. Anastaplo: I should like to have made the motion at the appropriate place in the last hearing, where I said something about a motion, and with the hope that additional inquiry on those points would have been cut off. But seeing that I did not have the opportunity to make it at that time, I certainly would like to have it ruled on at this time.

Motion That the Committee Now Rule, etc., and Rulings Thereon

Commissioner Stephan: Well, I am going to read the motion for the record, and you tell me if this is the motion that you have in mind:

> "I move that the committee now rule, on the basis of the objections I have raised, that my responses or lack of responses at any time in the course of this rehearing, to the inquiries about affiliations, as well as to the inquiries about Marxist or Leninist doctrines, should have no adverse bearing on my application. [fol. 126] "I further move that the committee rule that no further inquiries into affiliations be permitted, or any other inquiry related thereto."

Is that the motion you wish to make?

Mr. Anastaplo: Yes, sir.

Commissioner Stephan: The committee has considered your motion for some time prior to your arrival here this afternoon, and the motion is denied.

Mr. Anastaplo: Do you care to indicate why it is denied, or would it be too long at this time?

Commissioner Stephan: I think it would be too long at this time. Generally speaking, it would simply abort the purpose of the hearing, in our view.

Commissioner Moses: Mr. Chairman, as long as the motion has apparently a double aspect, may I suggest that the ruling cover the double aspect, separately, rather than jointly? There are two motions; there is "a further motion."

Commissioner Stephan: Yes, the ruling is meant to cover both motions.

COLLOQUY

Mr. Anastaplo: When you speak of aborting, you assume, of course, that the inquiries there described are within the purview of the Supreme Court order?

Commissioner Stephan: I do. Within the purview of the functions of this committee, as well as the Supreme Court order.

Mr. Anastaplo: I see.

Commissioner Stephan: You have also presented to us, and I assume you wish to have introduced into the record, certain communications that you wrote to a member of the Supreme Court, commenting upon the procedures of this committee.

[fol. 127] Mr. Anastaplo: Those were submitted at the end of the—

Commissioner Stephan: At the conclusion of the last hearing, yes. One is dated May 6, 1955, written by you to this unnamed member of the Supreme Court of Illinois, from Paris, and the second written to the same gentleman —is that true?

Mr. Anastaplo: That is true.

Commissioner Stephan: —from London, dated July 14, 1955. We are agreeable to having those entered.

Mr. Anastaplo: And what about the other two documents submitted at the same time?

Commissioner Stephan: The letters that you wrote to the two newspapers?

Mr. Anastaplo: Yes, sir.

Commissioner Stephan: Letter dated March 28, 1954, to the Editor of the New York Times, a letter dated August 5, 1952, to the Editor of the Chicago Daily News; we will also take those.

Mr. Anastaplo: Can I assume that the letters of March 3 and March 27 are part of the record?

Commissioner Stephan: It depends on what we mean by the "record" in these proceedings. We do not wish to have those part of the transcript proper. However, all communications that you direct to the committee go into your file and unless they have absolutely no relevance to the proceeding, they would accompany the transcript on any review.

Mr. Anastaplo: May I also indicate that I am willing to consider myself sworn with respect to both those letters?

Commissioner Stephan: You may, if you wish.

Mr. Anastaplo: Will the committee consider me sworn?

Commissioner Stephan: You are talking about your letter of March 3 and your letter of March 27?

[fol. 128] Mr. Anastaplo: Yes, sir.

Commissioner Stephan: I think, again in the interest of some orderly way of proceeding, that if these are not part of the formal transcript, as we do not wish them to be, there is no necessity to swear to them. However, I can assure you that they will be given as much consideration as if they were sworn to.

Mr. Anastaplo: Thank you.

There are six further items. Would you care to accept them for inclusion in the record, also? That is, the items that accompanied the letter of March 27.

Commissioner Stephan: These were your book reviews and the picture of your daughter?

Mr. Anastaplo: Yes, sir. These are not matters I would ordinarily have brought up myself, but once they were brought up, I thought I should clear up the matter as far as the record goes.

Commissioner Stephan: The Law Review articles—you might state what the purpose of bringing them to our attention is.

Mr. Anastaplo: Yes, sir. These are—

Commissioner Stephan: I might say—excuse me for interrupting—that these arrived in my hands late Thursday and they have not been duplicated or submitted to the other members of the committee yet, so that many of them are not familiar with what you are talking about.

Mr. Anastaplo: These are book reviews of two different books, one of them a book on legal ethics, another a book on the survey of the legal profession. Among the purposes is that of giving the committee some idea of my general attitude toward the problems of legal ethics and of the [fol. 129] bar, and try to put my views—which sometimes are seen by this committee only in a negative way—into a general context.

Commissioner Stephan: We will take those, also. Do you have extra copies of all those papers? We have only one copy at the moment of the reprints of the Law Review articles, and they are a little difficult to reproduce.

Mr. Anastaplo: I will be glad to send them to you.

Commissioner Stephan: Will you submit three or four additional copies of each of those exhibits to your letter?

Mr. Anastaplo: And you will see there is also that article in the University of Chicago Maroon, which was referred to first by Mr. Carey, I believe, which I supplied a copy of; and a couple more items that I referred to in there.

Commissioner Stephan: We will take all the items that accompanied your letter.

Mr. Anastaplo: Furthermore, there is the information Mr. Bane requested about references in the texts, or the transcripts or letters, or any place else, I assume, to the investigator's report, and I supplied that in this letter.

Commissioner Stephan: Those were the passages from your appeal papers to the Supreme Court, and so forth?

Mr. Anastaplo: As well as letters to the committee, yes, sir.

Commissioner Stephan: Well, I think that the proper time to insert those into the record would be at the time you meet with us to correct the record. That is just addi-

tional information that you said you would produce at the request of Commissioner Bane; is that right?

Mr. Anastaplo: That happens to be so, with that. I did note that some of the items I was submitting to you in this letter were amplifications, and not simply corrections. I [fol. 130] went on the assumption that the committee would be interested in making sure that I got my views fully expressed.

Commissioner Stephan: We are interested in that. It is just a question of when you do it and how you do it. You are going to have plenty of time to say anything you wish to say to us.

Mr. Anastaplo: I have one minor procedural problem, and that is that with respect to the last transcript, that first sentence on page 118 is either inaccurate as recorded, or it is ascribed to the wrong person. I just note that for the moment, without attempting to correct it.

Commissioner Stephan: We can take that up at our next sitting.

Mr. Anastaplo: Finally, Mr. Stephan, if I may, I would like to speak to a broader problem.

Commissioner Stephan: Speak to a broader problem?

Mr. Anastaplo: Yes, sir.

Commissioner Stephan: What is the problem?

Mr. Anastaplo: You made some comments at the end of the last session about the nature of communism—

Commissioner Stephan: Right.

Mr. Anastaplo: —and the Communist Party, and its relation to bar admission. I have here, which I am willing to submit to you without reading it, a four-page statement, commenting upon, or in some ways trying to meet the problem as you presented it. And I would like to have an opportunity, by presenting this paper to you, to be instructed or informed if I have misconceived your position, and on the other hand, to give the committee an opportunity to learn what my position is with respect to your comments. I think—

Commissioner Stephan: Well, is there any way that you [fol. 131] could state the substance of that? It is four single typed pages, and before we could adequately respond or question you on what you present to us, we would have

to study it. If you feel the question I put to you can now be answered in a different way than you answered it, or enlarged upon—your answer enlarged upon—we would be happy to hear you.

Mr. Anastaplo: I mean, I have tried to compress it in this statement.

Commissioner Stephan: Yes. I understand that.

Mr. Anastaplo: And my time has been limited, since I had the transcript only since Friday. I would only say that I believe—

Commissioner Stephan: For the—excuse me, but for the benefit of those who weren't here, you might state exactly what question you are addressing yourself to.

Mr. Anastaplo: Yes, sir. I believe you start—at the top of page 115 of the transcript of the second meeting, you start there to give us some of your ideas about what the nature of the Communist Party is, what membership therein entails, and what the relation of that is to the bar admission problem. And this occupies substantially the rest of the transcript; that is, that, and the discussion resulting from it. And I believe that it is extremely important to me that discussion of this kind be cut off as soon as possible, if it is possible. That is to say, Mr. Stephan, you can give your ideas about what the Communist Party entails, and I can argue with you about whether a communist should be permitted to practice law. We can go on like this for some time, and I would be presenting an unpopular position, which would be prejudicial, in effect, to me, even though the entire discussion had nothing to do with my own application for admission. The purpose of my re- [fol. 132] marks is to show that it does not have, and that I raise, therefore, objections to further discussion of this kind.

Commissioner Stephan: Well, I suppose that you realize the purpose of my statement, which was to endeavor to show you that the committee's position is reasonable in putting the all-important question to you. And I prefaced my remark by saying that when we asked you if you were a member of the Communist Party, this was the kind of person we had in mind.

Mr. Anastaplo: But then—I'm sorry.

Commissioner Stephan: Yes. There is one ambiguity in the record that I would like to clear up. I don't know whether you noticed it or not. I stated what we conceive to be this hypothetical party member. At one point I said that if we asked the question, whether the applicant was such a party member, we would then go on to find out more about his affiliation with the Party. What I meant to say to you was, that if we asked you the question, "Are you a member of the Communist Party," and you should answer yes, we would then feel it was proper to go on to inquire what kind of a Communist Party member you were, and whether you were like the one in the supposititious case; do you understand?

Mr. Anastaplo: Yes, sir, but that is—

Commissioner Stephan: Whether you were an abstract communist, or a dues-paying communist, or just what type you were.

Mr. Anastaplo: But you chose to emphasize this whole problem at this stage of the hearing. I should like to indicate why it has no relevance, and that perhaps the committee should have called to their attention why it has no relevance, so that they can leave these matters aside, and go on to those more appropriate for my application.

[fol. 133] Commissioner Stephan: Well, I think it will surprise all of us to hear that possible membership in the Communist Party has no relevance to this hearing.

Mr. Anastaplo: To this hearing, yes, sir, and taking into account rules of law and ways that courts and quasi-judicial bodies go about establishing things that they are supposed to establish.

Commissioner Stephan: I am inclined to think that if you are not going to answer the question put to you, and if you are simply going to make a legal argument, which you certainly have a right to make, I think here again, perhaps you should do that at the end of the hearing.

Mr. Anastaplo: Would you care to accept—

Commissioner Stephan: Yes, I would like to have you hand that up at this time, because it may facilitate later questioning.

Mr. Anastaplo: I will simply identify the document by title.

Commissioner Stephan: All right.

Mr. Anastaplo: "Remarks by George Anastaplo, prepared for presentation to the Committee on Character and Fitness at the beginning of the meeting of April 7, 1958." I stress the time, because I want to insist upon the importance of having an opportunity to cut off questioning and a line of inquiry that are later shown to be irrelevant and inconsequential. There is a certain prejudice involved in having to go through these arguments with you all. And of course, if you revert to these matters now, I will be obliged to have to consult this document for answers, or paraphrase it, and it might be really, in the long run, more time-consuming than a simple reading now and thereby acquainting you with what I have written.

[fol. 134] Commissioner Stephan: Well, let the record show, the applicant has handed to the chairman the four-page memorandum that he just referred to, which will have the committee's consideration.

One of the Commissioners has an engagement and wishes to put a couple of questions to you. Commissioner Sawyier.

By Commissioner Sawyier:

Q. Mr. Anastaplo, I just want to ask you a couple questions to bring this thing down to a clearer level. As I understand it, you are not refusing to answer any questions that have been put to you because you think your answer would tend to incriminate you?

A. That is true, sir.

Q. Now, my second question is this, and I may have a third one, depending on how you answer. Can you, or are you willing to give a yes or no answer to this question: Are you refusing to answer in any instance because you think your answer would reveal facts of membership in organizations, or beliefs in doctrines, which membership or belief you feel might, in itself, reflect adversely on you? The question, Mr. Anastaplo, is, can you give a yes or no answer to that question when I put it to you; do you understand?

A. Yes, sir, I understand.

Q. In other words, are you refusing to answer anything here because you think if the answer were given, it would

reveal membership in organizations, or adherence to certain doctrines or beliefs, which membership or doctrine, in itself, you feel might reflect adversely on you?

A. Can I answer it with a short sentence?

Q. No, I want to know if you can answer that question yes [fol. 135] or no.

A. No, sir.

Q. You cannot?

A. No, sir. But I would like to explain why I cannot.

Q. Well, let me put the question to you, then, and you give what explanation you can with reference to that. Are you refusing to answer in any instance because you think your answer would reveal facts of membership in organizations, or beliefs in doctrines, which membership or belief you feel might, in itself, or in themselves, reflect adversely on you?

The question is, are you refusing to answer in any instance because of those—of that reason?

A. I would not care to say, but I would like to explain to you why I would not care to say.

Q. Well, you certainly have a right to explain. But as I understand you, you will not or cannot answer that question yes or no?

A. That is true, sir.

Q. Well, I will try once again.

A. But, I think—

Q. And then I will let you explain.

A. All right.

Q. Let's put it positively. Are you refusing to answer all the questions that have been asked, and that you have not answered in connection with membership or beliefs, on the grounds of the general principle that such inquiries are improper, even if and when put to a person whose answers, if given, would show no membership or no adherence to doctrines which in any way might be considered suspect by any member of this committee?

A. That is certainly true.

Q. I want to ask you the question again. I understand you [fol. 136] are answering this "yes"?

A. Yes, sir, I am answering that question "yes."

Q. Will you read the question again, Miss Reporter?

[The reporter read the question as requested, which was as follows:

"Q. Let's put it positively. Are you refusing to answer all the questions that have been asked, and that you have not answered in connection with membership or beliefs, on the grounds of the general principle that such inquiries are improper, even if and when put to a person whose answers, if given, would show no membership or no adherence to doctrines which in any way might be considered suspect by any member of this committee?"]

By Commissioner Sawyier:

Q. Your answer to that question is yes?

A. Yes, sir.

Q. How does that differ from the other question I put to you, Mr. Anastaplo?

A. Yes, I do not want to take advantage of an implication in an answer, which might suggest that I am answering a question about membership. I think the other question you asked did give me the opportunity to leave that implication.

Q. The reason you didn't—now I want to get this clear and in short, concise answers—the reason you didn't answer the first question as I put it to you is that you did not want to give an answer which would raise an implication one way or the other—in this case, in your favor?

A. That is true, perhaps. Let me say this, "which, if answered, could raise an implication in my favor." I mean, I don't want, in answering you, Mr. Sawyier, the second time—

Q. I understand. I am not trying to trick you, I am not trying—

A. I am not suggesting you are trying to trick me. What [fol. 137] I am trying to say is, I would rather be rejected by this committee, if this question became crucial, by taking a firm position on constitutional principle than to be accepted by seeming to take it, and at the same time taking a back door.

Q. By this principle you are referring to—that you just

referred to, you are referring to the general principle which I put you in the question which you answered affirmatively?

A. Yes, sir. Now with respect to the statement I would have made to your question that I did not answer, is—in addition to what I have just said, is that I believe myself eminently qualified for the practice of law.

Commissioner Sawyier: Thank you.

By Commissioner Stephan:

Q. Mr. Anastaplo, if I understand your position correctly from what you have said in the past, when you were asked about possible affiliation with the Communist Party, I understand your constitutional objection to the question is rested upon the theory that we are not permitted to inquire into your political beliefs, as such?

A. That is one, sir, one objection.

Q. That is one, and a strong one.

A. It is certainly a strong one.

Q. In the Douds case, which involved the non-communist affidavit issue, one member of the Court, at least, drew a distinction between membership in the Party which involves action and conduct as contrasted with mere political belief. Now, when we ask you if you are a member of the Communist Party, I take it you object to our inquiring into any action that that might connote?

A. Yes, sir. If it would make you appreciate my position [fol. 138] better, I could say simply, I would be opposed on principle, in any but the most unusual case, to inquiring into anything that is political or quasi-political. I mean, if the use of the word "quasi" would help—

Q. I am not sure "quasi" ever helps much.

A. Yes, I know. That is why I left it—

Q. Well, now, you have in prior hearings expatiated at considerable length about the right to overthrow; and you did that in response to questions from various commissioners. Did those questions not involve an inquiry into your political beliefs?

A. That is true, sir. In a sense these are inquiries into political beliefs.

Q. You have no objection to those questions?

A. I have objections to them, yes, sir.

Q. But at least you answered them?

A. I answered them because throughout this hearing and in previous ones, I have often waived objections I should have made, that I would or do have, simply in order to keep the issues as clear as possible on at least one or two points.

Q. Do you think the question that we put to you in our formal questionnaire, about your understanding of the underlying principles of the American Constitution, is an inquiry into your political beliefs, and hence forbidden?

A. There, the line comes close. I would not care to say it is, necessarily; perhaps in some circumstances it would be.

Q. Some questions about political belief are proper, then, and some are improper; is that your point?

A. I would say, if you want me to make a general rule, which I would hesitate to make, because these things depend [fol. 139] upon circumstances, I would say that questions about political beliefs are outside the purview of this committee, but I am willing to waive, to step aside—to waive objections that could be made.

Q. You didn't indicate, when you answered those questions, that you were waiving your objections, did you?

A. I think I have indicated throughout, and I think you will find in a number of my papers, that the inquiry, for instance, into revolution that we have seen throughout the life of this case, is inquiry which is really dangerous because of the kind of things it leads to. And I recommended very strongly in the letter to the Member of the Court, that you have—a letter of suggestions rather than criticisms, simply, I should add—I recommended very strongly that inquiries into these areas be completely blocked off simply because of the bad effects likely to follow when commissioners and applicant disagree about something about which they can become very excited.

Q. You see, I have this difficulty with your position. This is an inquiry into your character and fitness. I suppose that involves a certain inquiry into moral standards, at least standards that are commonly accepted in the community.

This is not a proceeding that involves the constitutional power to punish utterances. We are not dealing with a criminal situation. And I gather from some of the things you have said and written, that you analogize this proceeding to one where the power of the Federal Government to punish is involved.

I think that your beliefs in a great many of these areas have some relevance to your character. When we speak of a man's character we often consider what he believes in. Beliefs are the outer clothing of character, in many instances; is that not so?

[fol. 140] A. It is true.

Q. If you believed in cannibalism, or infanticide, or some other weird practice, I suppose that we would be permitted to exclude you from membership in the bar regardless of whether you were ever caught in an act involving those beliefs; isn't that right?

A. Cannibalism would be a hard case.

Q. I should think it would be an easy one.

A. No, I mean, the beliefs, that is, a theoretical defense of cannibalism. Certainly not. I can think offhand of one or two instances where cannibalism can be justified.

Q. Well, I am talking about a continuing institution.

A. That is something else again. Let me ask you—

Q. The point I am making is this. What you believe in, at least in some areas, is quite relevant to your character.

A. That may well be true.

Q. I think you would accept that as an abstract proposition, would you not?

A. Yes, sir. Certainly.

Q. But somehow, when we get over into the political arena with you, and we inquire as to your membership in the Communist Party—which, if it were a fact, would have, to many of us, serious moral overtones, because I make the assumption that the Communist Party is a conspiracy to overthrow our existing institutions, and do it as quickly as possible and do it by any means that are at hand, violence or subversion or anything else that accomplishes the goals—it seems very odd to me that you can't see the moral implications in that set of beliefs, when you would be quite ready to see moral implications in, let us say, beliefs about

private as compared to public matters. Do I make myself clear?

[fol. 141] A. Yes, sir. Mr. Stephan, obviously, I am not communicating to you; I am not saying these things are irrelevant in all cases.

Q. Which things?

A. These beliefs that you are talking about.

Q. Political beliefs?

A. Political beliefs, even, might be relevant in some situations. I am not denying that possibility. But let's take it to another area. Religious beliefs might be relevant. It may be important whether a person believes in certain doctrines of a particular church, but I have also refused, before this committee, to answer questions about religion.

Commissioner Carey: No, you weren't asked anything about religious beliefs.

Mr. Anastoplo: Well, about religious organizations.

By Commissioner Stephan:

Q. We asked if you were a member of any church.

A. Yes. But suppose you decided that certain religious beliefs are incompatible with the office of a lawyer, or that certain religious faiths were incompatible with the office of a lawyer. Do you feel you would be obliged to go off and ask people whether they were members of this or that church? Or is it that there are certain areas that are prohibited from inquiry by state or government officials, no matter how fruitful or enticing they might seem to them?

Q. Well, now, on that very issue, let me put this question to you: In the Douds case, again, which is 70 Supreme Court Reporter, the Supreme Court of the United States held that it was proper for Congress to require oaths from union leaders that they were not communists, if the union was to enjoy the benefits of certain sections of the National Labor [fol. 142] Relations Act, and that exercise of Congress's power was upheld against many of the objections that you make here, such as inquiry into private political beliefs.

A. That is true.

Q. I have difficulty in seeing why, if Congress can protect interstate commerce against communist infiltration, why the

bar of this state cannot protect itself against the same evil, against the same constitutional objections. Do you have any difficulty with that?

A. Yes, I have several problems with that statement of yours. This is one of the things I have discussed in my paper that you have before you. In the first place, you speak of the Douds case, and there are cases closer to hand for your purposes. I mean, look at cases involving admission to the bar.

Q. I have looked at them.

A. The Konigsberg case, and the Schware case. What do they say on this problem?

Q. The Konigsberg case doesn't pass on this specific question. The Konigsberg case leaves open the question of whether, in an admission proceeding, if the applicant is told that the question about communist affiliation is relevant and important to his admission, and if he fails to answer that question, what the constitutional result will be the Court left open, as I read the case—in so many words, at least.

A. Obviously, we differ. Let me also add that the Douds case, as I believe, is simply wrong on the issue and I would simply point to the dissents in the Douds case.

Q. You don't agree with the result in the Douds case?

A. I do not agree with the majority opinion in the Douds case. I would point to the dissents in the Douds case, and say, "That is where I stand." Am I ineligible because I [fol. 143] take the dissents of certain members of the Supreme Court seriously? Furthermore, Mr. Stephan, and I think this is a serious problem I am about to bring up, there has been no showing at any time in the course of these seven or eight years, why these questions or inquiries as to communist affiliations have any bearing upon my application; why is it important in my case; what have I done, what have I said, what do you know about me, that makes it important to emphasize, as you did at the end of the last session, questions about communism?

Q. Well, I think the answer to that is very simple. When any applicant comes in before us, we know very little about him or his beliefs or much about his past. This committee does not have any investigative facilities, that are regularly

available to it, at least. We have to get off dead center with everybody, and the only way we can, is to ask questions. We have formal questions we put in the questionnaire and after—

A. That is true.

Q. —and after having a man before us, other questions suggest themselves. Now, if we had to have independent information about every question we asked before we asked it, we couldn't ask anything in most cases.

A. I am not—

Q. Do you understand that?

A. I am not saying that, sir. I am saying, certain areas are more privileged than others, especially when you emphasize them after seven or eight years. I am not a new applicant; you know about me, you have heard about me before. I put it to you—you have nothing at all to justify asking that question. Yet you insist upon it.

Q. We have the ruling of the Supreme Court of Illinois that it was a proper question.

[fol. 144] Commissioner Young: May I put one thing to him?

Commissioner Stephan: Yes, sir.

By Commissioner Young:

Q. Mr. Anastaplo, if you are permitted to practice law, some day you may be on a case opposite me. I want to know whether or not I must, in my practice of law, deal with lawyers who are members of the Communist Party and who do not regard their oaths—

A. Let me ask you, sir—

Q. No. You answer my question.

A. Yes, sir, I appreciate your problem.

Q. Well, why don't you answer it, then?

A. But then—I will tell you why. Because I think you should also want, as your opponents and as your colleagues in the bar, men who stand on principle. And I further ask you, sir, whether you have seen anything from me, or heard anything from me, either in the present record or that in the last seven or eight years, which would indicate I would not take my oath seriously, or I would take unfair advantage of you if I were your opponent in a court of law?

Q. Let me ask you one further question. Do you believe in a Supreme Being?

A. That, I believe, sir, is out of order—for the reasons I have stated about objections to religious beliefs.

Q. When you took the oath here, you took that in the name of God, did you not?

A. I took a formal oath.

Q. Was the word "God" used, "So help you God"?

A. It certainly was.

Q. What is your understanding of God?

[fol. 145] A. I submit, Mr. Chairman, this is irrelevant inquiry, because this is an oath that is taken by everyone who comes before you, and you do not stop to ask whether they believe in a Supreme Being.

Q. Do you believe there is any difference between a sworn statement and an unsworn statement?

A. For most people, yes, there is.

Q. A few minutes ago you asked to be sworn. What was the purpose of that?

A. I wanted to make sure the committee regarded these comments, the same way they regarded the rest of the documents.

Q. You wanted us to believe that what you told us was one hundred per cent true; is that right?

A. Yes, but if the committee is using its judgment, it would know that it wouldn't have to be sworn in order to be true. But I wanted to be certain, simply because of certain formal requirements for use of records in courts of law, not because it's any more true because I have sworn to it. Let me also add, sir, this is a settled problem you are dealing with, the problem of the relation of a [belief in] a Supreme Being to the validity of one's oath. I submit to you that this problem has been settled in a formal sort of way by Anglo-American law, about a hundred years ago.

Q. But here, today, you asked to be sworn so that we would believe you, and then you tell me that your statement which is unsworn is the same as your statement which is sworn.

A. I am sorry, sir, you misinterpret what I said. I did not say I asked to be sworn in order to be believed. I asked to be sworn so that the documents could be used in a formal

sort of way, in the same manner as the other materials that [fol. 146] you have to consider. I don't believe this really has anything to do with the problem of what one's belief in a Supreme Being is.

Commissioner Stephan: Is that all you have, Commissioner Young?

By Commissioner Young:

Q. Do you believe it is necessary to believe in a Supreme Being in order to make an oath of any consequence?

A. I don't believe that is necessary in law. I mean, that is just what I remember vaguely from various things I have read.

Q. Let's go back to our original proposition. If you and I are on opposite sides of a lawsuit and you come in with a document, which you swear to, and which, under the laws of this state, you are permitted to sign as attorney for your client and swear to, would you not be able to say to me, "I swore to this but it doesn't mean anything"?

A. No, because I would take my responsibilities as a lawyer seriously. Do you find out from the people that you accept documents from, other lawyers, whether they believe in Supreme Beings, and whether they are communists?

Q. I want to know before we get any more members of the bar, whether or not they are communists.

A. I see. Up to now you haven't found out.

Q. Yes. In every single candidate that has come before me in the last four years, he has been asked whether or not he is a communist.

A. I see.

Q. At the beginning of these hearings I had some doubts as to whether or not you were a communist—

A. And now?

Q. And now I begin to think that you are.

[fol. 147] A. On the basis of what I have said so far?

Q. Yes; on exactly the tactics which you have presented here, I am beginning to think that you are.

A. Then this illustrates what I mean by saying that this kind of inquiry is very dangerous to pursue. It can lead to very misleading conclusions.

Commissioner Thomas: Mr. Anastaplo, may I call to your attention one factor mentioned by you a few minutes ago, one phrase, that has kind of stayed in my mind the last few minutes? You referred there at one point to the fact that your application in one form or another had been under consideration by this committee for some several years, and as I recall, your phrase was that we "knew all about you," or something to that effect.

Let me just throw out for your consideration the thought that—the difficulty that I have; and I think that perhaps some of the other members of the committee have, is that we do not know all about you, and that the reason why we do not know, in my own instance, is because you have not answered questions which would tell us all about you.

I only mention that in passing, for your consideration. I know you have given long consideration to this situation, but in the course of your preparation, or showing, or further answers, please think that over from the viewpoint of how it affects the Commissioners. I am not asking you for a talk or a speech or anything. I am only throwing it out for your own consideration.

Mr. Anastaplo: If I said you knew all about me, that obviously is incorrect. I thought I indicated that you know much more about me than you know about the usual applicant. I should also like to say one further thing to this [fol. 148] gentleman concerned. I don't know your name.

Commissioner Thomas: Well, let's go ahead and hear the rest of the inquiry which Mr. Stephan has.

Mr. Anastaplo: May I say one thing, however—some rather drastic things were said from that quarter. That is—

Commissioner Thomas: You will have full opportunity, Mr. Anastaplo, to go ahead and say anything you want to say, at the appropriate time. But right now, let's confine it to the answering of the questions.

Mr. Anastaplo: But will this be face to face with the committee, however? Will I have an opportunity to answer?

Commissioner Thomas: You will have the opportunity to answer.

Commissioner Stephan: Yes, you will.

Commissioner Thomas: You will have the opportunity to make whatever statement you want to make.

By Commissioner Stephan:

A. Mr. Stephan, there was one other point, then, in answer to your inquiry, earlier, about whether I was taking seriously the moral implications of your views, and I would also like to know why—maybe you don't care to say—how the inquiries as to Communist Party membership first arose in this case. Do you happen to know, Mr. Stephan?

Q. Well, I wasn't on the committee. All I know is, that we have to pick up history where it left off, and this committee, as presently constituted, had this issue presented to it.

A. It is significant, however, in order to analyze the importance of my position.

Q. I suppose someone, for some reason, which was sufficiently good to him, asked you the question.

[fol. 149] A. That is not true, sir.

Q. What happened?

Commissioner Thomas: Mr. Anastaplo, you asked Mr. Stephan a moment ago, what it was that caused this committee to ask you that question. He gave you his understanding of what it was, and you now tell him that is not true. To me, that indicates that you know what it was that caused the committee to ask you that question. If you do, you can at the appropriate time, talk all you want to about any factors, and so on, but right now, let's go ahead with your answering the questions that the committee puts to you.

Mr. Anastaplo: Sir, I thought the committee was putting to me the question if I understand the moral implications of the position Mr. Stephan was stating, and I was starting to answer that question.

By Commissioner Stephan:

Q. Yes, I would like you to answer that. To me, this is the nub of our problem.

A. So far as you know, you asked the question because it had been asked before, and it was left unanswered.

Q. I am asking it because I think that is the problem that has been presented by the record in the past and we

must in some way reach a decision on it; that is our purpose in being here.

A. But also presented are unanswered questions about the Ku Klux Klan. Why don't you ask about them?

Q. I will tell you why I don't ask a lot of things, maybe, in due course. But I don't think that you are questioning me at this point.

A. Then I will tell you that the question about communist affiliation arose in this case only after I had expressed [fol. 150] unpopular ideas about other matters. If I had not chosen to resist intimidation—I use the word advisedly—intimidation by members of the subcommittee who were questioning me, if I had simply given in to them on these matters of opinion upon which no problem of perjury, or oath, or anything else, arises, if I had simply given them what they wanted and not resisted them and thereby made them excited, they would never have gotten to the question of Communist Party affiliation.

Q. Well, I think that is conjecture. You can't know that.

A. You already indicate that you have no other evidence.

Q. I didn't indicate anything.

A. That you have no investigative arm.

Q. The question might still be asked, just as it is asked in countless other instances, because we think it is a pertinent question these days.

A. But in 1951, sir—1950, as indicated by that Law Review article I have cited to you, by Brown and Fasset, in the University of Chicago Law Review, applicants were being asked, randomly, say every other one, or I don't know how often, certain questions about political matters, political ideas. I was the only one, so far as I know, who gave the wrong answer to those questions, and the only one who thereupon was asked about membership in the Communist Party.

Q. Well, let's get on now with what we have before us.

A. But this speaks to the problem of how reliable my answers to your questions are. That is to say, my suggestion is that a good number of people who went through at the same time—if they did not perjure themselves—simply accommodated themselves very much to what they thought

the prevailing opinion was, and got through. For a committee on character and fitness, that is a very serious situation to permit to arise.

[fol. 151] Q. You are familiar, perhaps, with the proceedings that were once held before this committee in the case of *In re Summers*, at 65 Supreme Court, 1307—

A. Before this committee?

Q. They originated here.

A. The Summers case did?

Q. Yes, the Character and Fitness Committee of Illinois.

A. Oh, I thought you meant this particular District.

Q. Oh, No, I am talking about the Committee on Character and Fitness. That was a case in which a conscientious objector, who said he would not use force to combat any wrong committed against the state no matter how aggravated, was denied admission by the Character and Fitness Committee, and the Supreme Court of the United States upheld the decision of the committee in that regard. The committee held that such a view made it impossible for him to take the oath of office required of lawyers to support the Constitution of Illinois, because in the Constitution, citizens may be called upon to become members of the militia.

A. There are some very—

Q. One problem that bothers me in connection with that decision—which I suppose you don't agree with, either?

A. That is true.

Q. —is that if it is proper to exclude a man from the practice of the law because he won't use force to protect the State, is it not proper to exclude a man who would use force to destroy the State?

A. Do you want me to comment upon that?

Q. I would like to have you, yes.

A. In the first place—

Q. I make the assumption that a communist would use force when he is able to use it, effectively.

[fol. 152] A. As you say, I have serious doubt about the Summers case, and I think it was—that, too, I say, was really shameful, what was done there, especially—

Q. What was shameful; the Supreme Court's ruling?

A. The Supreme Court didn't make any ruling there, the State Supreme Court didn't. But the United States Supreme Court—I'm sorry, the State Supreme Court did not issue any opinion, is what I meant. The United States Supreme Court did, and it was dreadfully bad, resulting in part, again, from this business of inquiring into certain areas in which the committee members are not used to restraining themselves. That is, the war excitement and everything else took its toll upon the Summers application, with the result that this militia provision was worked into the opinion—into the rationale of his rejection—even though there were supporting or corollary laws which would suspend that militia provision with respect to conscientious objectors. That is—

Q. Well, I cite these cases simply to point out to you that whereas it is one of your favorite themes in these hearings that the committee is acting arbitrarily, unlawfully and unconstitutionally in putting these questions to you, I am pointing out what I think are some very close analogous areas where the Supreme Court of the United States has approved such action. And you may disagree, but it seems to me somewhat impertinent to continually harp on the theme that you are not getting a fair hearing, when we, as lawyers, have to pay some attention to what the Supreme Court of the United States says on civil liberties matters.

A. And I say— I have pointed, if you want to look at what the Supreme Court says, look at the Konigsberg case.

[fol. 153] Q. Well, I have done that.

A. Even though, sir, I am not, and none of you are ultimately bound by any particular doctrine that the Court may issue, you still have the right to go to the Constitution—

Q. That is right; but as lawyers, we also have to look at what we think are close analogies in order to arrive at some decision here.

Well, now, I want to turn to this remaining topic about your belief in—

Commissioner Rothschild: Mr. Chairman, could I ask one, in violation of our rules? It is right on this area.

Commissioner Stephan: Yes, sir. On this subject?

By Commissioner Rothschild:

Q. Could the State of Illinois, in your opinion, or the Supreme Court of Illinois, as State action, enact either legislation or rule, which stated that no person who is a member of the Communist Party could be admitted to the practice in this state? You left open Mr. Stephan's question on the analogy.

A. Yes, sir, I did, and I was going to speak to it. Membership *per se*, you speak of, sir?

Q. Yes, I think so.

A. I think that would be unconstitutional.

Q. How do you square that with the Douds case?

A. I think the Douds case is unconstitutional.

Q. Well, you leave us with a Constitution that applies to us, but not to you.

A. No. All right, then; if that is the way you want it. I think the Douds case is to be very strictly limited to apply to the sort of situation in which it arose. There are other cases—if you want Supreme Court cases to go by—there [fol. 154] are other cases, in this last term of Court, which would give you a more relevant answer to what the Court itself has thought about this.

Q. But you— Well, Douds was the law, and we didn't have the last term of Court, and you took the same position.

A. That is true. That is why I say I don't necessarily have to rest on that, the same way, obviously, the Konigsberg lawyers didn't rest on Douds. They rested on some idea of what the Constitution was, and the Supreme Court of the United States agreed with them. I mean, obviously, we don't—we can't operate on the assumption that whatever the Court has once ruled on, can never be raised again. The ultimate touchstone is the Constitution, as has been said many times, and it is to that I revert.

By Commissioner Stephan:

Q. It is not the function of this committee, though, to overrule the Supreme Court of the State, or of the United States, is it?

A. It is the function of this committee to be ruled by the law of the land, and if the law of the land indicates that

the Supreme Court of Illinois is wrong, it is the function of this committee to act the way that might seem to be contradictory to the Supreme Court of Illinois. The Supreme Court of Illinois, you must assume, would want you to act that way.

Q. Well, now, I would like to ask you a few questions about your belief in the right of overthrow. Just to clear the air on that subject, I think it would be helpful if you could sum up for us your views in this regard since many of us were not here to learn about them in the past.

A. First of all, sir, I have certain objections to this in-
[fol. 155] quiry. May I state them first?

Q. If you state them in the form of objections and not in the form of an argument, yes.

A. All right. That is—these objections are based on the premise that I have shown and I am willing to show my willingness and ability to take the oath of office for attorney in good faith, and that no indication has been given as to why I should be questioned further along this line.

I urge that controversial subjects, the kind you indicate you are about to embark upon, should be avoided, especially since there is no inherent need to discuss them. I have spoken already about the excitement that this sort of thing generates, and the prejudice which results. That is, questions about affiliations, as I have indicated, came only after, and only because I had been asked to give my opinions about the right of revolution. Heaven only knows—as the expression goes—what will flow from such a discussion at this time. So then, I simply ask you, isn't it best for the committee to decide that this has nothing to do with my character and fitness, and so advise the Court?

Q. You are asking that we advise the Court?

A. Yes, sir.

Q. The Court has asked us to advise them about your belief in the right of overthrow.

A. I see. But I suggest that on the basis of what you have heard, you are in a position to tell them that this belief has nothing to do with character and fitness, or my application.

Q. We haven't heard you, yet.

A. No; but on the basis of what you have heard so far, in these three sessions.

[fol. 156] Q. Well, I am not prepared to tell you one way or another about that at this point. That is one of the ultimate questions before us.

A. You point then to the Supreme Court order—

Q. What's that?

A. I say, you refer to the Supreme Court order as one of the bases for this inquiry?

Q. That is right.

A. Well, then, I must make objections to that. That is to say, I would first of all respectfully suggest that the Court has been led astray with respect to what the issues are. That is, they made this ruling under a misapprehension that this subject had something to do with character and fitness.

Q. I would suggest that is an argument you should put to the Court if the question arises.

A. The reason I make it now, I thought the committee was in a position to advise them of this mistake. Then I would state the objections themselves simply to the Court's order, and that is, it seems to me the Court is requiring of me more than it requires of other applicants. That seems in itself discriminatory, raising the issues of the equal protection of the laws and of due process of law under the Fourteenth Amendment. In addition, an abridgment of freedom of speech under the First Amendment seems to be a likely consequence of any adverse reaction by the committee to my views on the right of revolution.

I should therefore like to move that the committee rule that inquiries with respect to the right of revolution, or the use of force to revolt are irrelevant and unnecessary at this time. Let me stress again my willingness and evident ability to take the required oath in good faith. I submit that the proposed inquiry is irrelevant, discriminatory, without [fol. 157] foundation in the record, unreasonable, and dependent on standards and concepts that are vague, arbitrary and highly uncertain. The proposed inquiry is, therefore, a denial of the rights I have under the Fourteenth Amendment to the equal protection of the laws and to due process of law. The history of this case thus far should make these objections particularly appropriate at this time.

I further submit that the First Amendment precludes not only an adverse reaction by the committee to my views of the right of revolution but perhaps prohibits even an inquiry by the committee, in the present context and for present purposes, into such views. Among the cases relevant here are *West Virginia* v. *Barnette*, and the recent *Yates* case. I suggest, Mr. Stephan, that this committee is bound by the law of the land even against the Supreme Court of Illinois. Unless the committee requests it, I will not specify the detailed application of these various constitutional provisions to the inquiry now at hand. Permit me only to say that there are applicable here, most of the detailed enumerations I set forth at our March 21st meeting with respect to inquiries about affiliations and Marxist, Leninist or communist doctrines, except those based on my claim that the inquiries were outside the purview of the order of the Court.

I move, Mr. Chairman, that on the basis of these objections, further inquiry into these matters be deemed unnecessary for my application.

Commissioner Stephan: The motion is denied.

By Commissioner Stephan:

Q. You put considerable stress on the Konigsberg decision; but in the Konigsberg case, the Court examined the record to see what the applicant's views about violent overthrow were, and did not say that the inquiries in that regard were improper.

A. But neither—

[fol. 158] Q. A good deal of the case was devoted to that question. If that is your case, I don't quite see the propriety of your objections.

A. But neither did it say that if Konigsberg had refused to answer on these matters, he would have been ineligible.

Q. The Court didn't reach that point.

A. That is true. But I am reaching it.

Q. Well, I am asking you to state as concisely as you can, what your current views are about a citizen's right to overthrow the Government of the United States by force.

A. Yes, sir. Well, let me start by saying, first, my views are essentially like yours in this area, except I have been induced—

Q. I have never told you mine.

A. No, but I assume yours are very much like the general American views on the subject. I would concur in those. May I make an offer of some documents that might be most appropriate, expeditious and least likely to lead to misunderstanding in this matter?

Q. Certainly you can make an offer.

A. O. K.

Q. Can you tell us what they are?

A. Yes, sir. There are two sets of documents with respect to my views on the right of revolution. These documents reflect the views I now have on this subject and the views which I have had and expressed ever since my first appearance before the committee in November, 1950, and I can provide you citations to the transcript if you want to know where I have spoken about it before. Let me identify them. These documents contain excerpts from the works of President Lincoln, Senator Daniel Webster, St. Thomas Aquinas, as well as from the Declaration of Independence, [fol. 159] and from a brief I have heretofore written for litigation.

Q. For what?

A. For litigation. And I suggest the committee may want to recess for a few minutes to have read aloud and to examine these papers before proceeding with their examination on this subject. Let me note that there are included here, excerpts which report the ideas on the question of two of the greatest lawyers this country has produced.

I submit that the best way to learn what my ideas are on this subject of the right of revolution would be to start with the reading of these documents. There is likely, this way, to be less danger of misunderstanding. I would be very glad to submit them to you at this time.

Commissioner Leighton: May I suggest, Mr. Chairman, that we take them and also follow the suggestion of the applicant for a five-minute recess? I would like to look at those.

Commissioner Stephan: Yes. I am not sure we are going to question you about those as fully as we would like, after reading them for five minutes. It seems to me it is much like the other material you are submitting; in order to have it carefully considered, we have to give it real study. But let us have what you have.

Mr. Anastaplo: This is one advantage to knowing ahead of time what you are going to talk about, so that I can submit documents which you can study.

Commissioner Stephan: Well, we will certainly look at it. I will declare a recess for approximately five minutes. Would you mind letting us talk for a moment amongst ourselves?

Mr. Anastaplo: Certainly. I have two sets, if you want [fol. 160] to distribute them right now. But I would like to have one set—

Commissioner Stephan: They are all the same?

Mr. Anastaplo: They are both the same.

Commissioner Stephan: Put one of them over on that side.

[A recess was had.]

By Commissioner Stephan:

Q. Mr. Anastaplo, during the recess we looked at these three different statements you have given us about your belief in the right of revolution. One is an excerpt from the Declaration of Independence, another involves Lincoln's statement at his Inaugural Address in 1861, and one has to do with your own position as set forth on June 25, 1957, before the committee, this committee. You have also handed us passages from two authors, Thomas Aquinas and Daniel Webster, about the right to overthrow. Do these documents set forth your present beliefs in the right to overthrow?

A. Yes, sir.

Q. And you would—you take the statements made by Webster and Aquinas and Lincoln, as if they were your own on the question?

A. On the problem of right of revolution, yes, sir—with one reservation.

Q. Yes?

A. That is to say, both Aquinas and Webster are more radical or extreme than I would be.

Q. I see. In what regard?

A. Aquinas, for instance, indicates there are certain laws that would automatically require revolution in all instances. [fol. 161] Webster suggests that even the most minor infringement might justify revolution. I would be inclined to stress extreme provocation is necessary.

Q. Could you give us an example of the kind of provocation that would justify recourse to the right of overthrow?

A. As to the Webster excerpt, I would agree with him as to the instance, that is, the American Revolution. I would differ with him as to the extremity of the provocation. That is to say, I know the history, and of course he is presumptively in a better position to know it than I am. But I would say there is more provocation there than he makes it out to be. I suspect that he is minimizing the provocation of the American Revolution for rhetorical purposes, in order to show how important the provocation is that he is confronting.

Q. Is it your position that the decision as to violent overthrow is an individual decision in every instance?

A. A decision as to when the time has come—

Q. Yes.

A. —ultimately should rest on the individual. However, he should take into account, if he is a moral man, both the consequences of what he is likely to do, and the effects, in terms of results; that would simply mean taking in account things such as how much others agree with him, whether he is simply a minority of one, things of that kind.

Q. He should be guided by the prevailing sentiment in the community.

A. He should take that into account in considering the effect of his effort; that is to say, if he thinks that revolution is desirable, and nobody else happens to agree with him, but if you and I were to agree that he is right, that the revolution is desirable, we might still say that it would [fol. 162] be morally indefensible on his part to provoke one at this time, rather than to wait six months when he might be successful.

Q. Generally speaking, would you say the standard that

he must have recourse to is a subjective standard or an objective standard?

A. It is fundamentally objective, but not in terms of public opinion. That is to say, it's objective in the sense of Aquinas's—St. Thomas's—was objective. That is to say, he looks at certain standards, however he arrives at them, say natural law, and then says, "These standards require that this tyranny be overthrown at this time." In that sense it is certainly objective.

Q. Do you believe that before someone should exercise the right he must weigh the evil that he is suffering against the harm that may result from the active revolution, the violence that ensues?

A. Well, certainly. May I add, also, this would be the case not only with that but any other political action he takes; even with respect to this committee, I would say there may be instances when an applicant should say, "It would be more harmful to the Illinois Bar if I did not resist the committee by standing on principle than if I did resist them. Therefore, I will waive my privileges." That is the sort of decision that one has to make thoughout life.

Q. Let me put this case to you. Suppose that there are a large number of people in the southern states of this country, as indeed there probably are, who believe that the desegregation decision of the Supreme Court is against the public interest and if carried out any further will result in the mongrelization of the white race, and that if that should happen, civilization as we understand it, would be at an end. Let us suppose that they honestly believe that given the present public temper and the present makeup [fol. 163] of the legislative and judicial and executive branches of the Government, there is no way of arresting that trend through normal avenues of public expression and public opinion. Do you think that such a group, holding to those views, would be justified in attempting to overthrow the Government by force?

A. Let me say two things first. I would say, that it is not *per se* improper for them to consider this possibility. At least in a theoretical manner. Secondly, I would find myself—in fact, I do find myself extremely sympathetic to the dilemma, which is not altogether unrealistic, which they

find themselves in, that is to say, not in terms of mongrelization of the race, but in terms of very real considerations about the effect on public education, and, as they think, public morality.

I will say, first of all, I think I would have extremely great sympathy for those people, for the responsible ones, however, not for those who are simply, say, shooting off their mouths or trying to make political capital of it; but those who are thinking about it seriously, I would say, "Yes, you have quite a bit to say on your side." However—

Q. Are you talking about the people I am talking about?

A. Certainly; the people who are opposed to segregation decrees.

Q. And who hold these views as to what will follow from segregation—desegregation?

A. Certainly. I would say the mongrelization of the race argument really conceals more serious arguments. And I think the more serious arguments I would find I would take very seriously, from the more responsible ones among these people.

Q. There are a great many people who believe in the supremacy of the white race in the South, from what you [fol. 164] read. If those people get together and decide to revolt, is that a justifiable revolt? I don't think you quite addressed yourself to that question.

A. I haven't gotten to that point yet. I was only indicating first that I would think they would have considerable merit to their concern. On the other hand, I would also argue that in this case the objective circumstances do not warrant action on their part, either in terms of constitutional principles invaded, or natural law, or any other kind of rights of that nature, natural rights, being infringed. Consequently, although I would extend them my sympathy, I would have to counsel them that they are really being somehow immoral, politically wrong in this action, as well as unconstitutional.

Q. So in that instance, the objective standard, you feel, would override the subjective discontent these people are suffering from?

A. The subjective discontent is not the critical thing; certainly not. The objective standard is what you have to

look to, objective standards interpreted in principles as well as the work-a-day world that they are living in.

Q. Who establishes the standards?

A. In the best societies they would be established ultimately by the men who think. In the usual society they would be established either by tradition, by religious inculcation, or by passing on of notions from one generation to the other.

Q. You say the standards in the best societies would be established by the men who think?

A. Yes, sir.

Q. You mean, who think profoundly, I suppose?

A. Who think well—

[fol. 165] Karl Marx, for instance, was a thinker of considerable renown, and he had some very definite views on this subject which have affected the minds of a great many people. Would you say because his ideas had brilliance, or were articulated well, that they are necessarily the standards to be observed in the community?

A. Not necessarily, of course not.

Q. Is there a moral question here, as well as an intellectual one?

A. As to which thinking one goes to?

Q. Yes.

A. Obviously, the men who think would have to consider the thoughts of other men and weigh them one against the other. Karl Marx's would certainly be among those thoughts that had to be taken seriously.

Commissioner Moses: Mr. Chairman, will you have the question read again? I don't think the answer is at all responsive. It may be the only answer that the witness cares to give.

Mr. Anastaplo: I'm sorry.

Commissioner Stephan: Would you read the question again?

[The reporter read the question as requested, which was as follows:

"Karl Marx, for instance, was a thinker of considerable renown, and he had some very definite views on this subject which have affected the minds of a great

many people. Would you say because his ideas had brilliance, or were articulated well, that they are necessarily the standards to be observed in the community?"]

Mr. Anastaplo: And I answered, "Not necessarily."

Reporter: That's right. "Not necessarily, of course not," was the answer.

[fol. 166] By Commissioner Stephan:

Q. So that it isn't simply a question of the standards being developed by men of talent?

A. No, I haven't said that. Of course, it is quite possible the standards that are in fact developed might differ from one society to the other because they take as their source, different figureheads, different sources, for their ideas. I would say, ultimately, if these problems are thought through, and if various alternative approaches are considered, that there would be one general pattern of thought that would prevail, certainly in Western society. And this process of thought and the product of this thought is known as political philosophy, in the ancient sense.

Commissioner Moses: Mr. Chairman, I hate to interrupt again, but the question that was read, and which he did answer, "Not necessarily," was then followed by another question, which I believe asked, "Don't you think there is a moral element involved," and that is the question to which I didn't think the answer was at all responsive, and it may be that you can rephrase that question.

Mr. Anastaplo: I am quite willing to answer the question as you put it, sir. Certainly, if any of these men are talking about the fundamental problems of how men should live and what men should be guided by, what the goals of men are, they cannot escape moral problems or moral elements.

By Commissioner Stephan:

Q. It seems to me, the subjective versus the objective standard is quite important in connection with the questions we have been putting to you. If a group of com-

munists believe fervently, passionately, in the kind of sys-
[fol. 167] tem that is repugnant to us, if the standard is purely subjective, then they would have the right to overthrow the government as quickly as they could; would they not?

A. No, that is not simply the question. I mean—I do not assume that any fool who decides the Government should be overthrown has the right to do so. I am not saying any group of men, fools or not fools, simply because they decide to overthrow the Government, have a right to do so. I am saying only that under certain circumstances there is a right to overthrow governments.

Let me give you an example, a couple of examples, of recent date, of two unsuccessful revolutions, which I think reflect the general American opinion, I won't say necessarily reflect mine, but the general American opinion. At the end of the war, toward the end of World War II, Hitler's generals made an attempt to overthrow him. You have all heard that. They were unsuccessful. Two years ago the Hungarians made an attempt to overthrow the government. They were unsuccessful. There is no doubt, I think, on the part of the general American population, that both of these attempts at revolution were legitimate in the sense that there was no principle about the right of revolution being violated here. The only problem that one would have, I suppose, in the general opinion, would be in terms of the prudence, circumstances and consequences of the particular situations.

Q. Do you think the Marxian view on the right to overthrow is compatible with the Jeffersonian view?

A. I am sorry—you would have to tell me exactly what you mean by the "Marxian view."

Q. In the Communist Manifesto, which, as you know, was written by Marx and Engels, the statement is made that communist ends can be obtained only by the forcible over-
[fol. 168] throw of all existing social conditions. Now I take the Marxian view, as translated into 1958, would be that the working class is still being oppressed by the capitalistic, quote, "democratic system," unquote, as we understand it in this country, and that its overthrow is a desirable end, as quickly as it can be accomplished.

Do you feel that the Marxian view, as so defined, is compatible with the views that you express in these documents that you submit to us?

A. Do you think it is?

Q. Well, I am not up for admission.

A. I think I have expressed my views adequately on this particular aspect. I would say this. I have indicated very strongly the considerations of prudence, the necessity to consider circumstances, the refusal—

Q. You don't think that question can be answered yes or no?

A. No. I don't want to answer it yes or no, for two reasons. One is, obviously I do not want to be put in the position of endorsing—explicitly endorsing or denying communist doctrine. I am willing to be put in a position, having set forth my objections to all this kind of inquiry, of expressing clearly what my views are.

Q. I am always puzzled by your tendency to draw away whenever we get near anything labeled communistic.

A. That is true.

Q. You speak very freely and fluently about almost every other area of political life. What is so sacrosanct about that?

A. Well—of course you don't want to hear the enumeration of the objections. But you know already the notion [fol. 169] that I do not think the inquiry into communist principles and ideas, or into communist affiliations, is appropriate. Let me also add at this point—

Q. And everything else in the spectrum is?

A. Certainly not.

Q. For three hearings now, we have been discussing political philosophy in considerable detail.

A. I have indicated a willingness to waive—in the best of all possible worlds, which I drew only a sketch of in that letter to the Supreme Court Justice, I suggested what you should look into and what you should not look into. That is, this was done at a time when I was not before any body for admission, but it was simply an attempt to contribute to the refashioning of the Illinois bar admission procedures.

In that best of all possible worlds, this entire inquiry would probably have to be ruled out simply because it would go off into these other areas about particular affiliations or beliefs. You also realize, of course, I could say, "No, I don't believe in the communist notion about overthrow of government," and there would be no legal sanction relating to whether I am telling the truth about that or not.

Q. Let me ask you this. Do you believe that a statute—this is close to a question Commissioner Rothschild put to you—do you believe that a statute adopted by the legislature of this state which said that any applicant for the bar who believes in the violent overthrow of the present government of the United States by force or violence, or of the government of the State of Illinois, shall not be admitted to the bar of this state—

A. Who believes in—believes in, you say?

Q. Believes in—

[fol. 170] Commissioner Moses: You haven't finished the question. You haven't given any verb.

By Commissioner Stephan:

Q. —is valid or constitutional?

A. You say, anyone who believes in the right to overthrow the present government—

Q. The present government of the United States.

A. I certainly believe in the right to overthrow the present government under certain circumstances.

Q. Under present circumstances?

A. I mean—it is very hard for me to see how this—

Q. You can only overthrow the existing government under present circumstances, can't you?

A. I suspect that that law—and the man has taken no action besides that belief?

Q. He just believes in it.

A. Just believes that this government should be overthrown. I would say it probably is unconstitutional. But that is not the situation here, since I have very clearly indicated that I do not foresee any instance where revolution is either desirable or valid at this time.

Q. It seems to me that there is a syllogism which works

itself into this situation. I am not sure whether you would agree with any of its premises, but if such a statute is constitutional, as I think it may well be, and if the minor premise of the syllogism is that a member of the Communist Party does believe in overthrowing the present government by force, ergo, it follows, that a member of the Communist Party cannot be admitted to the State Bar. If my major and minor premises are correct, obviously the conclusion is.

[fol. 171] A. You and I could have many a long hour debating this problem.

Q. We have.

A. We have; but I would submit that it would have—I may be wrong; let me stress again, I may be wrong in many of the answers I give you as to whether I think particular statutes are unconstitutional or not. But that's not the issue. The issue is not about these supposititious cases but about my character and fitness, and you know about my character and fitness the claim on my part—and I have yet to see it demonstrated differently—the claim that I believe with respect to the right of revolution what practically every one of you believe.

Q. I had hoped, perhaps futilely, that by putting it the way I did, you might see what I consider to be the reasonableness of the questions we put to you about communist affiliation. Because to me, there is a very vital link between the two questions. One's right in revolution takes on a particular hue and complexion if he is an active communist.

A. I see, sir. Are you suggesting that active communists would talk about right of revolution the way I would, the way I do?

Q. That is really the question I am putting to you.

A. But—let me put it this way. Do you think, have you heard anything I have said about right of revolution, that would suggest to you that I am an active communist?

Q. I may answer that more fully when we have finished. I don't care to answer that question now.

Commissioner Stephan: Mr. Rothschild.

Commissioner Rothschild: You asked him whether a

statute which precluded from admission someone who "believed"—

Commissioner Stephan: Yes.

Commissioner Rothschild: I would like you to ask him the same question, changing the word "believe" to "advocate."

[fol. 172] By Commissioner Stephan:

Q. Did you hear that question?

A. Yes, sir. If you mean by "advocate," someone who is going out and setting up groups, trying to get them organized, there may be more serious problems. I don't know.

At the same time, you talk about this link in a chain, Mr. Stephan, but the chain does not reach me, somehow, or my case, my evidence, my character and fitness. This is really a theoretical dissertation and discussion, about matters that do not relate to my own ideas and my application for admission.

I mean, let me stress again, Mr. Rothschild, I may be wrong in what I am saying about these things, but is the fact that we have differences of opinion any evidence at all as to my character and fitness?

Q. I think your membership in the Communist Party, if it were a fact, would have some relevance. That seems to be the question.

A. That is a very, very remote thing on the horizon.

Q. What is?

A. The possibility of membership in the Communist Party as far as this committee is concerned. I submit, you can point to nothing I have said, where I have said anything about communism, or you have no evidence relating to communism, you have no indication at all about communism. All you have is differences of opinion at the most, about whether a communist should practice law. I mean, this is no more than you would have if certain members of your committee were to say a communist should practice law. You certainly wouldn't hold them ineligible for holding that opinion on this committee.

Q. Because I feel the question is relevant to the right of revolution category, I am going to put a few specific

[fol. 173] questions to you again. Are you a member of the Communist Party?

A. Well, Mr. Stephan, I respectfully submit that this attempt, this kind of attempt, is basically unfair. You know what my position is on this point. And if you want now—

Q. Just answer the question.

A. But there is an objection on the basis of elementary notions of fairness, here. I am not pointing to you, necessarily, but the committee as a whole. You know what my position is on this. You know that I refuse to answer the question. And yet you try to work into this question about right of revolution these problems about whether one is a member of this or that. There is no indication at all by anything I have said so far, about revolution today, that would make it necessary to go through this procedure again.

Q. Are you suggesting this is a kind of smear technique; is that what you mean?

A. I am saying one thing is that it is an improper use of those three categories the Court put in its order. These categories, one of which is "right of revolution", were not intended by the Court, I submit, to include inquiries about affiliations. An attempt was made once to put inquiries about affiliations under "activities." I think that was improper, too. I think it is improper to put it now under this notion of "right of revolution."

Q. Are you declining to answer the question?

A. Yes, for the same reasons as heretofore.

Q. Have you ever held office in the Communist Party?

A. And for the same reasons as heretofore, I must decline to answer questions of this kind.

Commissioner Stephan: Are there any questions now from the members of the committee?

[fol. 174] Commissioner Leighton: I would like to ask one question.

Commissioner Stephan: Commissioner Leighton.

By Commissioner Leighton:

Q. Mr. Anastaplo, when you said earlier in the course of this hearing, that you don't think that any question concerning political beliefs is within the purview of this com-

mittee, do you mean by that that it isn't within the purview of any state-created committee, or just this committee?

A. A committee that exercises state power.

Q. I understand. All right. That is because of the Fourteenth Amendment, I take it.

A. The First and Fourteenth Amendments, not only as they affect freedom of speech, but also as they affect certain problems of procedure, due process and equal protection of the laws. In addition, the *ex post facto* and bill of attainder clause may be applicable.

Commissioner Stephan: Commissioner Seiter.

By Commissioner Seiter:

Q. Mr. Anastaplo, I have a question which I would like to ask you; maybe a couple of questions. You have commented on the point, and we all, I think, agree with this, that Court decisions, very strictly speaking, bind only the parties thereto, and one could always seek a somewhat different result in another proceeding; is this correct?

A. In a most strict sense, yes.

Q. Yes. Now I would like to ask you this question, and I put it to you apart from any belief or disbelief in communist doctrine on your part; it is not a question about Marxist doctrine. Do you believe that if a State or Federal [fol. 175] Court rendered a decision in a matter involving you, which decision, let us assume, has been appealed as far as appeals are permitted by the present legal system, all the way to the United States Supreme Court—if you then thought that the decision of the United States Supreme Court were simply wrong, of shameful, or, in your view, unconstitutional, would you feel that you had the right to resist the implementation of such a decision, say by force? Do you understand my question?

A. Yes, sir. I would not care to say that there would be no instances in which force might have to be brought to bear. Let me also add this, if I may. You have one instance where this very process has been run through. That is to say, with respect to my own case before this committee. This was in a matter particularly important to me, and at the conclusion of the legal process, in 1955, I found myself

without a career. My reaction was simply to accept it, I had no thought about revolution, I made no attempt at revolution, and I went home and tried to forget about it. I would not be before you now, probably, except for the fact that intervening cases arose which made me think I had been not only morally right, but constitutionally right in the sense of Court doctrine, although—

Q. Let me put the question, virtually the same question, again, to you, and say that suppose the implementation of the Court's decision required, let us say the action of, oh, let us say of a federal officer, such as a marshal. Would you feel that there were any circumstances in which you could resist his carrying out in the ordinary manner, let us say the execution of the decision or judgment of the Court, if this were involved? Do you understand what I am asking?

A. It is quite possible. Let me give you another illustration of that—

[fol. 176] Q. No. Do you understand what I am asking you?

A. In other words, the Court has made decision, you feel there is a mistake possible; then there is necessity that there is—you are confronted with the fact that an officer of the law is going to enforce the decision—

Q. Exactly.

A. —under circumstances which you resist?

Q. Yes.

A. I would cite, if I may, here, St. Thomas—

Q. I would like you to answer the question without citation. What would you do? What is your belief?

A. I would not care to say there might not be instances where resistance to an officer of the law executing such a mandate would not be improper.

Q. All right. Then I will ask you the further question, which I think led up to this. If you were then, let us say restrained by force, or were punished in some fashion for resisting such an officer, would you think that you had been unconstitutionally treated?

A. It may well be. It could be. If I had—if the extreme case had come up, resistance might well rest on the notion

that the Constitution had been violated, or infringed by the Court order. If I may point to that excerpt from Thomas—Thomas, as I say, is much more extreme than I am. He says any law inducing idolatry, or anything contrary to Divine Law, should be opposed in every instance. I would not go that far but I can see, with Thomas, there may be instances where even judicial decrees might have to be resisted. We saw instances of that, for instance, in Hitler's Germany, where men—

Q. Well, my question is confined to the United States of [fol. 177] America.

A. Obviously, under present circumstances, I don't think it is likely to happen. But for instance, in Germany where judicial decrees, in accordance with the form of the constitution, were resisted. And I submit, for instance, that judicial decrees in accordance with the form of the constitution in Hungary, in '56, would not have been a sufficient reason for stopping a revolution.

Q. All right. Your answers lead me to ask you one or two more questions. If you were admitted to the bar, and you had a client who was a party to litigation of some sort, and you felt the decision of the court, the lower court, as it was appealed, and all appeal procedures were exhausted, the decision was adverse to your client, and you felt that the United States Supreme Court was acting in a shameful or unconstitutional manner, in your opinion, would you feel free to counsel your client to resist by any means, force or what-not, the execution of such a decree or judgment as the court may have rendered?

A. Certainly not, as an attorney. I would say to him that, "Your relation to me is with respect to the legal system as it exists."

Q. I see.

A. "I can advise you what to do, what your rights are, and what the probabilities are." It is up to him, then, to decide what to do. Let me also add, that the instances that I agreed might exist are extremely remote, and I do not see any such on the scene today.

Q. But if the question were asked about litigation to which you were a party—I understand your answer about the client. But where you, yourself, are a party, and you

think it is unconstitutional, do you feel there are circumstances where you could yourself resist the execution of this [fol. 178] in the ordinary manner, let us say by federal or state authorities?

A. Yes, sir, there may be extreme circumstances when this resistance would be a defense of the Constitution.

Q. And this is after the United States Supreme Court has said, "We have considered your constitutional objections and we find that there are none"?

A. It is not impossible to imagine circumstances where the members of the Court are simply corrupt. Then it might be the constitutional thing to say we must resist. But suppose that the United States Supreme Court did rule that idolatry should be accepted; and it ruled this after extended litigation in every state, and set it up—set up some now dead pagan religion as the official religion of the country, to which everyone had to pay obeisance. I ask you, gentlemen, would the fact that the Court had ruled this way make any difference—much difference as to what you would do? That is to say, you certainly would give it consideration, but you would not be ultimately bound by it.

Commissioner Seiter: I think he has answered my question.

Commissioner Stephan: We are going to adjourn in a couple of minutes.

By Commissioner Young:

Q. Mr. Anastaplo, in connection with your answer a few minutes ago relative to the situation with reference to desegregation, can you tell us whether or not you can conceive of the situation in the South getting to such a state that the right to revolt would be justified?

A. I could conceive of it sometime, ten, fifty, a hundred years from now. I would say it isn't moving in that direction now.

[fol. 179] Q. Could you conceive of that during your possible expectancy of your life as a practicing lawyer? A. It is possible that it could happen, sir, and it could happen within thirty, forty years, certainly. It could happen. But

I don't—I would not bet on it happening, and I would not expect it to happen.

Q. In connection with the statement which you made in 1957, in which you said that you had no present expectancy that the right to revolution would be presently exercised, do you agree that during the next fifteen, twenty, thirty years that you might be practicing as a lawyer, that there would be situations in which you could assert the right to revolution?

A. I don't expect it to happen.

Q. But, might it happen?

A. I mean, it is possible. I mean—let me give you an example.

Q. Let me give you an example. We are going to admit you to the bar—or may.

A. Yes, that qualification is in order.

Q. You may practice thirty to thirty-five years.

A. Yes, sir.

Q. Now, as a practicing lawyer, are you or are you not, going to come to situations where you will say, "Well, I am now going to advocate the overthrow of the government"?

A. I ask you, sir, what would John Adams have answered to the same question in seventeen seventy—when he was being admitted to the bar—or whenever he was admitted?

Q. I never read anything except Mrs. Drinker's book on John Adams. You tell us.

A. Well, he would say, "I cannot predict what the government may do." The government may usurp the Constitution. I don't expect it to, but it may.

[fol. 180] Q. I am not asking you to predict what the government may do. I am asking you to predict what you would do.

A. If the government usurps the Constitution, one may, if he is a moral man, have to resist it.

Q. Let me ask you this. There was a piece in the newspaper the other day, saying the nuclear fallout had greatly increased in the New England States. Suppose in the next ten years that fallout is, say, tripled, and the government then in existence says it will do nothing about it; do you think that would give the people the right to revolution?

A. Tripling, no; I can see nothing about tripling that would require revolution. I understand there is a considerable margin.

Q. Well, suppose it gets up close to the danger mark?

A. You assume, then, is it—suppose the leaders of the public go insane and decide to have everyone killed, both Russians and Americans. Something will have to be done under that circumstance. I don't predict that happening. I don't expect it to happen. But who knows?

Q. Suppose that the fallout rate gets up to seventy-five per cent of toleration. Would you then advocate overthrow of the existing government?

A. It would depend on what the arguments are that are being used to justify it.

Q. Under certain circumstances might you do so?

A. It is possible, under certain circumstances, you and I would have to agree that something has to be done to stop this. You may be there before I am. You know—I am serious. One reason I think many of you would be there before I am is because I think I am able to restrain myself more than most of you are.

[fol. 181] Q. I have served my thirty-three years at the bar and I want to know what you are going to do during your thirty-three years.

A. Let me put an example to you. What kind of an answer would you expect, say, of a young Jew, in Germany, in 1930, being admitted to the bar?

Q. I am not talking about Germany; I am talking about the United States of America.

A. The reason I point to Germany is—

Q. The reason you point to Germany is because you don't want to talk about the United States.

A. No, sir.

Q. You go away all over the country, to talk about other things.

A. It is because I have indicated to you that I don't see anything wrong in the United States calling for a revolution at this time, here. But the young Jew in Germany, in 1930, may also not have seen anything wrong. But should he have been precluded from the possibility of a revolution in 1935—three, five years later? It is quite possible—it is

not quite possible, I mean, it is very remotely possible, but it is certainly possible, that something may happen in this country in ten, twenty years, or tomorrow, if you want to make it really radical, something could happen tomorrow, that might justify revolution.

Q. Tell us something that you think might happen tomorrow that you think might justify it.

A. Suppose for some reason or other, the legislature and government went insane tomorrow, from some kind of chemical reactions—only Washington went crazy. What do [fol. 182] you and I do until next election? Do we sit by and let them destroy us?

Q. Can we make the example a bit more realistic?

A. It has to be unrealistic, because realistically, I say, I see nothing, I expect nothing. But if you insist upon talking about possible conjectures, I have to talk about very unrealistic examples, or else go elsewhere for them.

Commissioner Stephan: I think we are going to have to adjourn.

Commissioner Christianson: I have some questions, but I am sure that we should adjourn now.

Commissioner Stephan: I think some others have, too.

Mr. Anastaplo: Can you give me an indication of what you are going to inquire into, so that I can prepare documents?

Commissioner Stephan: Will you wait just a moment, while I talk to the Chairman?

[There was discussion, stated to be off the record.]

Commissioner Stephan: The next session will be on Wednesday, April 23, at one o'clock.

Mr. Anastaplo: Would you care to receive another document before we close?

Commissioner: Stephan: What is it?

Mr. Anastaplo: This is an article by a member of the Detroit Bar, who is both a teacher and chairman of the local bar admissions committee and chairman of the subcommittee on character and fitness. I think it may be useful for you to look at. This is by John R. Starrs, Detroit, and it appeared in the University of Detroit Law Journal in 1955.

Commissioner Stephan: I would suggest that on Law Review articles, and things like that, not directly on your own character, or your own writings, that you give us citations.

[fol. 183] Mr. Anastaplo: But this is on the case. Note 57 and following, particularly. This may speak also to the problem of reputation, which seems to be one of the things the Court had indicated.

Commissioner Stephan: We will take it, and the meeting is adjourned.

[The hearing recessed at four o'clock.]

[fol. 184]

BEFORE THE COMMITTEE ON CHARACTER AND FITNESS
FIRST APPELLATE COURT DISTRICT OF ILLINOIS
SITTING AS COMMISSIONERS OF THE
SUPREME COURT OF ILLINOIS

In re: GEORGE ANASTAPLO (Session IV)

Proceedings: April 23, 1958

Reported by: Elsie W. Bingham

Present:

Commissioners Charles A. Bane, J. R. Christianson, Richmond M. Corbett, James E. Hastings, George N. Leighton, Walter H. Moses, John M. O'Connor, Jr., Edward I. Rothschild, Calvin P. Sawyier, Francis J. Seiter, Edmund A. Stephan, Jerome S. Weiss, Horace A. Young.

*****

Richard H. Cain, Secretary.

*****

Commissioner Stephan: The hearing will come to order, please.

Do you have any statements or request of the committee at this point, Mr. Anastaplo?

Mr. Anastaplo: Well, the statements I would make are contingent upon what your schedule is. Will you give me an idea of how long you intend to proceed today?

Commissioner Stephan: We have, I would say, a few more questions to ask you. I have a couple, and three or four of the other Commissioners have miscellaneous questions to direct to you that have occurred to them in the course of the hearing, and which they have held until this point.

[fol. 185] By Commissioner Stephan:

Q. There is just one question I want to get clear in my own mind, and perhaps it troubles other people, too. On the question of possible communist affiliation, is it your position that a question directed to that matter is irrelevant, or that notwithstanding its relevancy, it is an improper question because of protection that you have under the First or Fourteenth Amendment?

A. Well, I would say first of all, that it's an improper question under the Constitution, on the basis of the various reasons that I have given from time to time. I would say, furthermore, that even if it is proper in some cases, some foundation or relevance for the question would have to be shown. Third, I would say, that even if no foundation or relevance has to be shown, a refusal to answer the question for the reasons I have given—mistaken reasons or not—would be only one more piece of evidence in the record, and would be, I would suggest, extremely flimsy evidence in this record, where there is absolutely no foundation.

Q. That would be a question of weight rather than relevance, would it not?

A. The last point would be the problem of interpreting the evidentiary significance of the refusal to answer, yes, sir.

Q. I am not sure that you have actually answered the principal question I put to you, which is, whether membership in the Communist Party has relevance to the question of your character and fitness, whether you are basing your refusal to answer on the grounds of irrelevancy or constitutional right.

A. I would say that it's fundamentally irrelevant in this case.

[fol. 186] Q. You are aware of the fact that there are many people in jail today who—because of communistic

activities—and apparently lawfully in jail, under Supreme Court decisions; is that right?

A. Yes, I know there are people in jail and that they have had judicial review.

Q. By the Supreme Court of the United States.

A. By the Supreme Court of the United States. I would, of course, question the—I mean, I would agree with the dissenting opinions in those reviewing cases. I would say that in the remarks that I gave to you at the beginning of the last session, I state my position and then I proceed to concede points, until I come to the end, where I grant you, for purposes of argument, the evil nature of the Communist Party or the Ku Klux Klan, the relevance of it for bar admission cases in principle, and so forth. Then I would say, "But in this case, of what significance is it?" And I think, my contention would be that I have shown that it is of no significance in this case.

Q. And your point there is that because there is no other evidence in the record of communist affiliation?

A. Not only that, but also because of the positive testimony both of the member of the Court that I referred to in the February 28th hearing, as well as the reasons I have given for not speaking to these problems.

Q. I have difficulty in thinking you are pressing that point seriously, that an unverified statement by a member of the Supreme Court, made at a time that has not been identified, about this committee, which then had a different membership than it has now, is entitled to much probative weight.

[fol. 187] A. I only refer to it as one more piece of evidence by a man—

Q. Evidence?

A. Evidence, yes, sir, because there is a special relationship between this committee here, and the Court. The member of the Court who made the statement knows he made it; the committee that heard the statement knows the member of the Court who made the statement will read this record.

Q. Well, I was under the impression that you had adverted to that alleged statement by a Supreme Court member, not for the purpose of showing one way or another

about your possible communist affiliation, but rather that this committee was not acting in good faith in pursuing the point.

A. That is true. The purpose of the statement was not as testimony or evidence in my behalf, on the issue, but only speaking to the problem of foundation or justification or purpose of the question in this context. Perhaps this would be an appropriate time to indicate one rough statement that I have. That is to say, I have here a perhaps simple-minded analysis, but from your point of view and assuming for the most part your standards, of one question. That is, you have been referring to questioning as to Communist Party membership, and I have an analysis, which I will not present without permission to, of a situation which must raise for you one essential question, assuming you take your inquiry seriously. The essential question would be, "Why does he not answer?" I can give you a few remarks on that that would apply both to the Commun . Party, Ku Klux Klan, and the Silver Shirts of Ame ca.

[fol. 188] Q. This is mainly by way of argumentation, is it not?

A. Well, the advantage of giving it to you in this manner would be that if someplace along the way, my logic or my use of the facts is faulty, you would immediately say, "Stop, don't go any further." My belief is that this analysis covers the field, and I think you probably would agree with it.

Q. Well, I may ask you that question shortly, to give you the opportunity to answer. I would like to ask you a couple more questions on this problem of relevance.

A. Yes, sir.

Q. If we assume; arguendo, that the question as to whether you are an active member of the Communist Party is relevant to your character and fitness, I take it that your constitutional objection would then come to the fore. And that is, that regardless of the fact that there might be a public interest in finding out the answer to that question, that your private interest in keeping your political views to yourself overrides that public interest. Is that a fair statement of your position?

A. That would be part of it. I would also say that although it may be a public interest, arguendo, again, a public interest, in knowing this about particular members of the bar, or applicants for admission to the bar, there may be still another public interest which I would defend, opposing the advantage of such inquiries for bar admission purposes.

Q. What may that be?

A. You might say that inquiries into these matters are relevant for bar admission purposes; that is to say, if you knew that a person was a communist or a member of the Ku Klux Klan, or perhaps in some circumstances which I think could be dreamed up, a member of the Republican [fol. 189] Party or the Democratic Party, it might have a bearing upon his character and fitness. Then I would say that there would be other considerations that would be stronger than character and fitness purposes, for bar admission procedures. You might simply want to have a general rule that such inquiries are not pursued. You might feel that the advantage you would gain by the information which you might or might not get, would be far less than the risks you run by leaving such precedents around, for a man less responsible than you are in the way that you use them. I mean, arguments of this kind, along this line, would also speak to the problem of public policy.

Q. You see, I always have difficulty with your classifying communist affiliation in the same category with other types of political activity, because the law has singled out, as we have said many times, that type of activity, and put it in a separate classification, and to some degree at least, and under certain circumstances, will punish a criminal. I think you will admit that in the abstract, but I think you do it frequently with tongue in cheek, because you immediately put it back in the same category with other political activities after admitting what you must admit, namely, that the thing has been given special treatment.

A. I grant you that. I grant you that. But the special treatment—

Q. I don't think you fully appreciate the problem that we have, since that type of activity can be criminal, and we are asking you if you have ever engaged in it, in effect,

we are asking if you have ever engaged in criminal activity of this type; you can characterize it as political or not, but it is proscribed activity.

[fol. 190] A. But the thing is, Mr. Stephan—I mean, we talk about public policy considerations. It may be important to resist such questions about communism, not because of the harm that they might do to the Communist Party, but because, if we assume your view of what the Communist Party is, the communist applicant is not going to be much affected by these questions, anyway. I mean, if you assume that he would lie, cheat, defraud, and everything else, he would have been in the bar ten years ago, or eight years ago, as it has been in my case, if he is that kind of person. But the importance of resisting such questions is not necessarily, let's say, for the benefit of a member of the Communist Party, or for the Communist Party itself; one reason is, because it is so dangerous, when applied to other groups, and I do not want to be part of a procedure or acquiesce in methods which are so evidently dangerous. I mean, I can see what they have done in this case, and only the most elementary knowledge, say of English history, tells what they have done in other cases.

Q. I suppose the Supreme Court had that problem constantly in these cases, such as Smith and Yates and Douds. They have moved into what you term the political areas.

A. The Supreme Court had the problems of passing upon the constitutionality of particular Acts of Congress which have a special status, and which they were reluctant to overthrow, which they have overthrown so few of since the middle of the 1930's. But this is not the issue here. The issue here is my character and fitness, and how this relates to my character and fitness, how refusal to answer the questions might relate to my character and fitness, especially when the refusal is put in terms of very old-fashioned principles.

[fol. 191] Q. Well, now, I will give you an opportunity to state what those are. Why do you not answer the question as to communist affiliation? You stated you had a statement to make.

A. No. I see. That wasn't exactly the question I had to speak to. But—

Q. I understood you to say that the reason for your not answering was something you wanted to enlarge upon. If I am wrong on that, tell me what you were talking about.

A. Yes. What I meant to say was that what I wanted to speak to was how the refusal to answer, granting your presupposition about communists in general, can be interpreted.

Q. Well, I would like to hear you on that.

A. And this, as I say, would apply as well to the Ku Klux Klan and Silver Shirts of America. There are three possibilities. One is, I am a communist, Type A or Type B; the second is, I am not a communist. There is a fourth, which is that I don't know whether I am a communist or not, but I will discount that as irrelevant here. Now suppose I am a communist? Do I refuse to answer because my answer would prejudice my admission possibilities? This assumes, of course, that I would answer honestly. Thus, under this supposition, I do not answer because I am the kind of person who would answer truthfully, if at all. Is that the situation? Am I, then, a communist who would not lie, who would rather be deprived of his career than lie or take unfair advantage of you? Obviously, something is wrong with this alternative: a drastic revision of your views of what a communist is would have to be made, if this were the situation. If I am this kind of communist, should I not be encouraged to enter the bar? Certainly you would have, I submit, few, if any objections, to this kind of communist.

[fol. 192] Commissioner Rothschild: May I interrupt you, Mr. Anastaplo?

Mr. Anastaplo: Yes, sir.

Commissioner Rothschild: Are you now saying to us, you can't be a communist of this type, because if you were, you would long since have answered yes to the question, and been admitted?

Mr. Anastaplo: No, this is a man—I will come to that point, in the series here. So let us turn to another possibility. That is a very good point, Mr. Rothschild. I will speak to it in just a minute.

Commissioner Sawyier: But you won't answer that question, will you, George? Mr. Rothschild is asking you whether you are implying by this example you are giving, any statement of fact as to what you are or what you are not, and what you believe.

Mr. Anastaplo: No, I do not intend to imply that by any of the statement I am making.

Commissioner Stephan: These are hypothetical men, are they?

Mr. Anastaplo: These are men that—I mean, I think I can show that I must be one of the three men, one of the three, and that any applicant in my circumstances would have to be one of the three.

Commissioner Sawyier: Which of the three is the pea under?

Mr. Anastaplo: Is the what?

Commissioner Sawyier: Is the pea under.

Mr. Anastaplo: Let's turn to the second possibility. Suppose I am not the kind of communist I have just described. By the way, this is not irrelevant, constitutionally; that is [fol. 193] to say: the methods used and the standards applied have to have a reasonable relation to the objective pursued, under the Fourteenth Amendment, and that is part of what this is designed to supply.

Suppose I am one of the unscrupulous, lying, cheating, scheming kind of communists. I am sure there are such in the Communist Party, as well as in the other—as well as in the major Parties in the United States. In fact, I am sure that there are numerically more in the Republican and Democratic Parties, if only because there are so many more of them. I am not saying the proportion is the same, but I would say, numerically. But suppose I am one of the communist type scoundrels, which is what you are interested in. Then why, in the name of heaven, do not I simply answer your question in the negative? I could say, "I am not a member of the Communist Party, I have never been a member of the Communist Party, I have never belonged to the organizations on the Attorney General's list, I don't know anyone who is a communist, I have never attended Communist Party meetings"; what more could you ask me to say that I could not say? If I am a scoundrel, why don't

I say these things and remove one of the principal hurdles to my admission? I could even say I had held out, all this time, on a misguided principle, but I have decided to forsake this principle and give up. What would keep a scoundrel from saying all these things and thereupon entering the bar and subverting it? Certainly not his conscience, by that admission. Nothing but fear, fear of prosecution and imprisonment for perjury, and the possibility of subsequent disbarment.

But would not a scoundrel know what we decent men know, would he not know that he could in this case, safely [fol. 194] make all these denials that I have just indicated, without anything but the remotest chance of being punished for them if they are untrue? Would he not know what you and I know, that there is not one bit of evidence about communism in the record that has accumulated for eight years; would he not know that a member of the committee has pointed out in a paper filed recently in the Supreme Court of Illinois, that there is not the slightest evidence of Communist Party affiliation in the record? Would he not know that there is in the record even testimony from a Supreme Court Justice related by me, that I have referred to earlier, which would at least give him an indication of what is in the record, or what the Supreme Court thought was in the record? Would not this scoundrel think it almost a hundred per cent sure thing?

Grant him the slightest amount of courage, why does he not take advantage of it? Would not this scoundrel know what we honorable men know, that this case has had considerable publicity for eight years, with even his photograph in papers all over the state in which he has lived his entire adult life, and yet no evidence has been produced about communism or about the other organizations that we have talked about? No one has come forward. Would he not know that an independent investigator, an investigation by a member of this committee—if we assume your definition last time of what this committee consists of—an independent investigation by a member of this committee in his home town of three thousand had produced only flattering reports? Would he not know that every one of his former employers, questioned by the committee, had been favor-

able? Would he not know that no informer had turned up from his party cell to expose him? Would he not know, in [fol. 195] short, that he could simply say no with impunity, and get all of this out of the way?

If he is a scoundrel, why doesn't he? In fact, if he is a scoundrel, which I assume is what you are interested in, why did he stand on principle many years ago and allow himself to be trapped in the first place?

So we must set aside the second alternative. The first one was a communist who is not a scoundrel; the second one was a communist who is a scoundrel. There is only one possibility left, the applicant who is not a communist. Then why does he not say so? Could it be, that like the first of the two communists we have talked about—

Commissioner Sawyier: George, there are two possibilities left. You can be a non-communist who is not a scoundrel, and a non-communist who is a scoundrel.

Mr. Anastaplo: Yes, but that is not a problem here—for purposes of this inquiry.

Could it be, as I was saying, that like the first of the two communists we have talked about, this non-communist is a man of principle? In any event, he could say no, and could do so as safely as a communist scoundrel. Why does he not say no, and apologize for having taken the principle seriously?

These are all the probabilities of any significance for your purposes, I submit to you. I describe three men; the first and third, communist or non-communist, are, it would seem, honest, reliable men. Their only fault is too great an attachment to principle. The second one may really be a scoundrel, but if he is, it is extremely difficult to see why he has not taken advantage of it.

I submit to you on the basis of this analysis, your insistence in this case and on this record upon the question [fol. 196] about Communist Party affiliation simply cannot make any sense for character and fitness purposes. This lack of sense, especially since the chairman has attempted to give a rationale for the purpose of the questions to justify them, to specify them—this lack of sense has constitutional implications under the Fourteenth as well as the First Amendment. All it succeeded in doing is penalizing

an applicant with principles, whether he is a communist or non-communist.

Now, let me read just a couple of more sentences, and then I will stop and ask if you want me to go on. In order to be altogether scrupulous, I must refer to two other remote possibilities. The first is, I could be an unscrupulous communist who had been ordered by his superiors—and I leave it to you to decide whether I am someone who acknowledges superiors in these matters—who had been ordered by his superiors to take the position I am taking despite the fact that there is no evidence of communism in the record and despite the fact that I could lie and get into the bar. That is one of the other possibilities.

The second possibility, which is less remote than this one, a little more plausible, is that I could be an unscrupulous communist who has been ordered by his superiors to take the position I am taking in order to establish a precedent favorable to unscrupulous communists who might come after me. I can show, I think, that both of these possibilities are extremely unlikely, if not impossible.

Commissioner Stephan: Do you want to put your question?

Commissioner Hastings: There is a third possibility there among those last ones.

Mr. Anastaplo: Perhaps I should just simply finish this, [fol. 197] so you have the entire picture. Let's go back to the second remote possibility—I'm sorry, to the first of the two remote possibilities, that is, the man who has been ordered by his superiors to take the position I am taking.

Now, this is the way it would go. My superiors want me to do this, in order that I might be a martyr for communist purposes, and to discredit anti-communist efforts in Illinois. I have no airtight logical argument against this argument. I do say that anyone who would believe this explanation would believe almost anything. Before you accept this kind of explanation, consider one implication of it. Would you not have to assume that all these hearings are completely irrelevant? I am free to decide at any time, under this theory, when I should enter the bar, when I have been enough of a martyr, and you could make nothing but a

favorable judgment when I decided to give in and deny all memberships. Or conversely, you might say that nothing I could say from here on out would be conclusive, because it would simply be part of an over-all plot.

Besides, would I not be even more effective as a martyr if, after eight years, I finally gave in by denying I was a communist and thereby trying to show up the committee by being admitted to the bar?

There is another thing wrong with this wild possibility. That is, it is a theory fitting in just as well with the supposition that some or all of the members of this committee are disciplined and unscrupulous communists, members of the Communist Party. For example, one could say that a disciplined communist member of this committee was ordered, back in 1950, to keep asking questions about communism until he ran across a foolish young non-communist who would stand on principle and refuse to answer. Then, [fol. 198] he was ordered, he was to press this young man and make him take a stand on the whole thing so that a martyr might thereby be created for the communist cause. I take it that you agree with me that we had better set this possibility aside.

But there is this other possibility, and that is, the establishment of a precedent. This would be, under this supposition, a way to get unscrupulous communists in the bar, by taking advantage of a precedent created by a softhearted committee, or court, on behalf of an applicant who is really a communist but who seemed to be acting simply on principle, about whom nothing communistic is known.

But, gentlemen, why should the Communist Party take a chance on such an awkward, expensive, and so far, unproductive approach? Nothing has happened in my case, so far, that has kept a slew of communists out of the bar, present company possibly excluded, of course. Not every applicant is asked whether he is a communist. As you have all indicated, I suggest, it is a matter of chance whether a real communist is even asked. And if communist organization and discipline are anything like what you gentlemen think they are, you can rest assured that any unscrupulous communist who comes your way, especially since my case first became known in 1950, is well prepared to give you

safe answers and take your congratulations with him into the bar.

Even Commissioner Young, who informed us at the last meeting that he questions about communism every applicant who comes before him, can give us no assurance at all that he has not been letting communists in by the droves. No, gentlemen, there simply is no basis in this case for insisting upon your question about communism, or, for that [fol. 199] matter, about the Ku Klux Klan or the Silver Shirts of America.

The analysis I have just made has implications with respect to the due process of law. Your approach is inherently ineffective for the purposes a reasonable man may claim for it. But your approach is all too effective in discouraging your applicants to stand by principles, to speak truthfully to you, and to take seriously constitutional government, personal integrity and the rule of law. These, indeed, are very grave results of what you have done, far graver for the Illinois Bar and the State of Illinois than all of the threats anticipated in the combined efforts of the Communist Party, the Ku Klux Klan and the Silver Shirts of America.

By Commissioner Stephan:

Q. Are you saying that if we had some independent evidence that you were a Communist Party member, that then our direct question to you would be of a different quality, and you would have to answer it?

A. I am not saying that. I am saying that the lack of independent evidence makes the question valueless and unreasonable to insist upon in this record. If you had independent evidence, the only thing I would change would be —and if the applicant knew about it—would be the fear of perjury. I would change nothing else in the analysis I have given.

Q. When you say the question is valueless, suppose you answered it, "Yes, I am a communist," and then we moved from that proposition to the degree of your activity; suppose we found out you held office in the Party, suppose we found out you met secretly once a week with other Communist Party members, and were hatching a subversive course of conduct—

[fol. 200] A. Certainly—

Q. —then the question would be proved not to have been valueless, because it would have led us into an important area of inquiry; isn't that so?

A. Except, not if you assume one point, which is implicit in everything you say.

Q. What is that?

A. You are, in effect, describing the second man that I have described. Why should he answer yes, if he is the kind of person who is engaging in these kinds of subversive activities, in going to regular Party meetings, and otherwise subverting the country? What this analysis is really based upon is common sense—a common sense appreciation of what the circumstances are. And lest you think that this kind of analysis is inappropriate—I mean, I take for my model for this kind of analysis the very tight, the much more tightly woven arguments along the same line that Abraham Lincoln used, even after he was in the White House, to explore for himself the implications of various answers, usually on the slavery question, but other problems, too. I think this is a legitimate way of proceeding.

Q. Are you saying to us that you will not answer the question directly, but that you want us to arrive at an answer by a process of exclusion?

A. I say that there are three possibilities, one of which—

Q. Isn't the burden of your presentation that you are not a communist?

A. No, because—it certainly is not, and if I have left that impression, let me quickly remove it. Logically, what is still left open for you are the first and the third men; and the first and third men, as I described them, are [fol. 201] eminently eligible for admission to the bar.

Q. The first man is the scrupulous communist?

A. The scrupulous communist, who would not lie, would not cheat, who stands on principle, and you have had a good test of his scrupulousness.

Q. He would answer the question yes?

A. No, he might not answer at all. The same way the third man might not answer at all. There are three men that you are dealing with.

Q. Some people have trouble with the concept of the scrupulous communist; I, for one.

A. If you say the first one was inherently impossible, you have left the third one, but that is not the argument I am making.

Commissioner Stephan: Are there any questions that anyone would like to put to Mr. Anastaplo? Mr. Young.

By Commissioner Young:

Q. Mr. Anastaplo, what were your activities on Tuesday, April 8, 1958?

A. Tuesday, April 8?

Q. That was primary election day.

A. I think I stayed home most of the day.

Q. Did you serve at the polls on that day?

A. No, I didn't.

As long as this question has been raised, I might as well submit a document. I was somewhat troubled after the first hearing about Mr. Bane's questions as to primary—I mean as to voting—as to serving, I am sorry, with respect to serving as election judge, and I proceeded a couple of days [fol. 202] later to write to the Board of Election Commissioners, to inform them that it had been suggested to me that my activities might have been improper, to explain the circumstance, to indicate that I had been ignorant, as I truly was, of the possibility of improper activity, to offer to repay any moneys improperly received, and to request that they let me know as soon as possible on this matter, as I was slated then to serve at the coming election. The only reply I received were instructions from the board as to what my service would consist of in the following election.

But since I did not want to take the chance upon prejudicing my position or seeming in any way to be unreceptive to the implicit advice Mr. Bane was giving, and since, besides, I was at that time recovering from an attack of streptococcus, it proved very convenient to stay home.

I should like to submit for the record, the letter I wrote to the officials I have described.

[The document was handed to Commissioner Stephan.]

Commissioner Stephan: This is an exact copy of the letter you sent to Judge Otto Kerner on March 1, 1958?

Mr. Anastaplo: Yes. The only effect, by the way, as far as I can see, the only effect of this whole thing has been to discourage the service of what had been considered to be a rather good election judge.

Commissioner Stephan: Do you have anything further?

Commissioner Young: Yes.

By Commissioner Young:

Q. Do I understand that you had, in former elections, served as a Democratic election judge?

A. Yes, sir. And I think, in one election, as a Republican judge, when the need was very pressing and someone asked [fol. 203] me. I began to reconstruct it—

Q. Have your activities in the Republican Party and the Democratic Party been limited to the service on these occasions at election—on election day?

A. I am afraid I must refuse to answer that question on the same grounds that I have refused to answer other questions about affiliations.

Q. You have heretofore talked freely about those election matters, have you not?

A. This is a matter of public record, and I was willing to speak to that, yes, sir.

Q. And you have waived your objections as to the matter of the Republican Party and the Democratic Party, but not as to the matter of the Communist Party; is that right?

A. I have not waived my objections as to the Republican Party and Democratic Party, no, sir. I have only indicated service as election judge on several occasions, which is a matter of public record. I have not indicated anything about my attachment to or affiliations with the Republican Party or Democratic Party, and I will continue not to do so.

Q. Did you serve as a Republican judge when you were, in fact, a member of some other Party?

A. I am afraid that is an improper question, and not to be—

Q. Why is it improper?

A. Because you are asking whether I am a member of the Democratic Party.

Q. No, I am asking whether or not you have misled the county authorities.

A. I am sorry.

Q. I am asking you whether or not you have misled the [fol. 204] county authorities?

A. As I have indicated before, I had understood—obviously if I served both of them I could not have been a member of both of them, unless, of course, I switched; people do that from time to time.

Q. Did you switch?

A. The only requirement, sir, so far as I know, so far as I knew then, and so far as I still know, because I still don't know whether my action was improper—the only requirement is that one should not have voted in the primary of the opposite Party within a certain number of months, in order to serve as an election judge for that particular Party. That requirement I had fulfilled. I had fulfilled it at the time and I had no problem with that point.

Q. And do you refuse to tell us now whether you served as a Republican judge when, in fact, you were not a member of the Republican Party?

A. Certainly I refuse to say that. I think that the service is *pro forma*, as I have indicated before. I understood it to be *pro forma*.

Q. What do you mean, *pro forma*?

A. That is to say, the procedure in my precinct, so far as I know, it is the procedure all over Chicago, is that a precinct captain goes to people in the precinct whose intelligence he respects, or whose judgment he likes, or whose reputation he knows about, and asks them whether they will serve as a member of the board for him, or under his auspices. No question is even asked of the applicant whether he is a member of the Party for which he is serving. I was never asked. And I was even asked by precinct captains who knew I had served for the opposite Party the time [fol. 205] before. But as I say, I took to heart the implicit advice given, and I have written to the appropriate authorities for guidance.

Q. Mr. Anastaplo, I call your attention to the last page of

the application, which we are now currently considering, and which you signed. Is that your signature?

A. Yes, sir.

Q. And did you swear to that application?

A. Yes, sir, in the usual manner.

Q. And have you ever had any conscientious scruples about taking an oath?

A. No, sir, I haven't had any conscientious scruples.

Q. Have you ever, on any occasion, elected to affirm rather than to swear to a document?

A. Not that I know of, no, sir. No, I don't believe I have—although I would say that I really don't see anything wrong with doing one or the other.

Q. Do you understand that when you took this oath that you intended to represent to us that there was some sanction back of it?

A. Yes, sir, the usual sanction that is applicable to all such matters, that I was requested to sign the paper and to get it notarized, which I did.

Q. And did you believe that by subscribing this oath that you were representing to us that it should be believed in some greater degree than some application which was not sworn to?

A. Are you asking now for my understanding?

Q. Yes, sir.

A. To me, it didn't matter which way I did it, it was equally valid; that is to say, I didn't stop to think at any [fol. 206] time along the way, to say to myself, "Be careful now, because this one here you've got to sign, and get notarized." It made no difference to me whether it was notarized or not; it would be equally truthful, either way. But I was quite willing to cooperate with the forms that the committee requested, and to get it notarized.

Q. Do you distinguish at all between the validity or evidentiary value of a sworn document as opposed to an unsworn document?

A. Sworn documents are generally considered more valid for legal use, certainly.

Q. And why?

A. I take it, for some people, the fact that they have been sworn to with the proper form, and the fact that they

thereby become subject to perjury considerations, is an important factor in what they say.

Q. Is that an important factor in what you say?

A. It would be if I were inclined to speak untruthfully, but since I was inclined to speak truthfully, it was an irrelevant consideration.

Q. Well, on this occasion, were you speaking truthfully or untruthfully?

A. I have been speaking truthfully ever since I have first encountered this committee. That has been my problem. Seriously, Mr. Young, there have been a lot of people who have not had the trouble I have had with this committee, simply because they have spoken untruthfully to you—not you, personally; I don't know who has appeared before you.

Q. Do you know of anyone who has spoken untruthfully to us?

A. I have common sense evidence of it.

[fol. 207] Q. You made the statement; I am asking you, do you know of anyone who has spoken untruthfully to us?

A. Not by name, but I can give you certain evidence of people who have spoken untruthfully to you. If you will look in the University of Chicago Law Review, I think the spring of 1953, you will find an article there by Brown and Fassett of Yale, in which they describe a report, a poll they took of my classmates, who went through the bar admission proceedings at the same time I did, and who had heard of my difficulties with the committee; you will find there a good number of them indicate, if I remember correctly, a good number of them indicate that they were asked questions by the committee, questions about opinions, not about memberships—no one at that time was asked about memberships, unless they gave the wrong answers to questions about opinions, so far as I know—they were asked questions about opinions, to which, if they had answered truthfully, they would have answered other than they did. But I think as one of them said, "In order to avoid trouble, I gave them the answer I thought they wanted."

Q. Will you produce those classmates for us?

A. I don't claim to know the names of them. I say, if you look at this report, you will find a fairly well-substantiated

account, by two members of the legal profession and of the legal teaching profession, who report on this. And doesn't it stand to reason that if this committee, as it was at that time, if this committee asks test questions, such as, "Do you think a member of the Communist Party should be allowed to be admitted to practice," and it asks this of a young applicant who comes in the door and sits down—my estimate would be that about half of them were being asked that at the time—if it asks that question of these young applicants, [fol. 208] what answer would you expect them to give, irrespective of what they believe? I know what answer they have given; in most part, they have said, "No, we agree with you, we don't think a member of the Communist Party should be admitted to practice." That is the safe answer they give. Only an occasional few—well, only one gave the wrong answer. And for giving the wrong answer, which I am sure others shared if only because I know that youth is sometimes rebellious and differs with its elders, only one gave the answer, but I am sure there must have been others that shared the answer. That article I referred to substantiates what I think is the case.

Q. Do you understand that there is any sanction standing behind the oath, other than the fear of prosecution for perjury?

A. Certainly there are other sanctions; not legal sanctions.

Q. What are the other sanctions?

A. Depending upon the individual. There would be the sanction—

Q. What is the sanction which stands back of the oath, so far as you are concerned, except prosecution for perjury?

A. I mean—let me state, the prosecution for perjury is not a sanction that applied to me.

Commissioner Young: Will you read the question, Miss Reporter?

[The reporter read the question as requested, as follows:

"What is the sanction which stands back of the oath, so far as you are concerned, except prosecution for perjury?"]

By Commissioner Young:

A. One could have a very strong commitment to the truth, which is a stronger sanction than prosecution for [fol. 209] perjury, simply because one has his own internal judge, who passes judgment on what he is doing and what he is saying. That is a stronger sanction than prosecution for perjury, simply because prosecution for perjury cannot reach most of these cases. I think it would be very difficult to reach in most of the things I have said, in these proceedings.

Q. What is this vague thing that you call the "internal judge"?

A. Well, it is known today as conscience.

Q. So that you have back of the oath, the matter of fear of perjury, and conscience; is that right?

A. Certainly those are back of oaths as people ordinarily take them. And may I add one point to the previous comment I made about the fact that it was because of the wrong answers to certain questions that led to the other questions about affiliations. In a way, that is essential to this entire hearing. Mr. Stephan has pointed back to the history of the case. I agree, the history of the case should be looked at, but the history of the case should be properly understood. I would suggest to you, and I think I can establish it fairly well, that at the root of this case—and of the insistence upon these questions which I have not answered—at the root of the case is a stalwart, if at times misguided or awkward, defense of the teachings of the Declaration of Independence, especially the right of revolution. I mean, in other words, in its essence, this case could be summed up by saying that I have been kept out of the bar for eight years, because I took seriously the teachings of the Declaration of Independence and defended them against members of the committee who were perhaps at that time too excited or too uninformed to understand that I was [fol. 210] defending principles that they themselves really believed in.

Q. Mr. Anastaplo, I read to you this statement from the case of *The Central Military Track Railroad Company* v. *Rockafellow*, R-o-c-k-a-f-e-l-l-o-w, which is in 17 Ill. 541, and reading from page 554:

"But one having no religion, believing in no God, and not accountable to any punishment for falsehood here, or hereafter, except his own notions of honor, veracity and amenability to criminal justice, cannot be sworn, as no legal, moral, conscientious obligation or responsibility, in the view of the law, can be imposed by an oath, and he may not testify without."

Did you ever consider that?

A. I should like to say a couple of things to that. First of all, what is the year of that case?

Q. Eighteen hundred fifty-six, and I don't find that it has been overruled or modified since then.

A. I would say that in fact, this ruling is dead law. I think even the most elementary knowledge of Anglo-American law would furnish us with a very clear indication that that simply is not the rule of today. Secondly, I have not spoken to the issue of whether I have or have not religious affiliations. I have not denied the possibility that I have religious affiliations, or that I have eternal sanctions, or sanctions that apply to me in the afterworld. All that I have refused to do on that issue is speak to it.

Are you insisting that I am required, that an applicant is required, before he appears before this committee, to indicate whether he believes in the kind of sanctions you are talking about?

Q. You are coming before this committee and you are asking me and my fellow members to believe what you have told us.

[fol. 211] A. I should think, Mr. Young, that your concern on this point would have been more appropriate two months ago, or eight years ago, by your previous committee. I would say, furthermore, I should like to remind you of a statement by the chairman, Mr. Stephan, last time, that he considered my unsworn documents the same way as he considered my sworn documents. I should also like to know, if this is a point that bothered the committee, whether they now want to rule and request of me that I indicate what my religious beliefs are or are not, before they accept the testimony I have given. Is this the problem, Mr. Chairman, which is before this committee?

Commissioner Stephan: No, that isn't the problem.

Mr. Anastaplo: Then is there something that I have to speak to, on this issue?

Commissioner Stephan: What is the last question put to you? Is there a question that you haven't answered?

Mr. Anastaplo: No, but it is the problem I am faced with now. I am faced with the implicit, if not the explicit suggestion that all I have said here is to be questioned, or not to be considered valid.

Commissioner Stephan: Commissioner Young asked you what sanctions you thought attached to your oath.

Mr. Anastaplo: Yes, and I have indicated—

Commissioner Stephan: And you have told us what sanctions you think are attached to your oath.

Mr. Anastaplo: I have indicated two sanctions. My answer was not exclusive.

Commissioner Stephan: Nobody has drawn any inferences from what you have said. I don't know why you leap to the conclusion that you are necessarily prejudiced in what you said.

[fol. 212] Mr. Anastaplo: From the very tenor and construction of Mr. Young's questions, I am led, simply as a matter of precaution, shall we say, to inquire of you whether this is an issue, whether this raises the problem I should speak to now.

Commissioner Stephan: I explained to you that in the course of the proceedings, various questions of a miscellaneous nature have occurred to committee members, which the chair asked them to hold in abeyance until the formal questioning was over with. This is one of them.

Mr. Anastaplo: Mr. Chairman, I am put in a very awkward position. I have to determine—and this is one of the problems of the proceedings of this committee, and always has been—I have to determine, at the risk of my career, which question, by which member of the committee, is going to be taken seriously by the committee a month from now, or six months from now.

Commissioner Stephan: I don't know how anybody can tell you that.

Commissioner Leighton: Mr. Chairman, in view of the fact that Mr. Corbett and I have to go to a committee hear-

ing, may I ask that the applicant be dismissed for a few minutes, and then that Mr. Corbett and I be excused, so that I may ask a question of the chairman? I suppose this is going to be adjourned to another—

Commissioner Weiss: You are asking for a recess?

Commissioner Leighton: Yes.

Commissioner Stephan: We will have a five-minute recess. Will you excuse yourself, Mr. Anastaplo, please?

[A recess was had.]

[fol. 213] Commissioner Stephan: Commissioner Young, do you have any further questions to put to Mr. Anastaplo?

Commissioner Young: Yes, one or two questions.

By Commissioner Young:

Q. Mr. Anastaplo, just before the recess, in answer to my question as to what sanctions you considered back of an oath, as I understand, you said that one was fear of prosecution for perjury, and second, conscience; and then you said that was not—that those two items were not exclusive. Is there some other item which you believe is a sanction back of the oath?

A. One which is certainly there for many people, of course, is the fear of eternal punishment.

Q. I am not asking about many people. I am asking you. What is your belief?

A. There is a possibility that may be my belief, but I do not care to speak to it.

Q. Do you refuse to answer that question?

A. Yes, sir, on the grounds this is an inquiry into my religious beliefs, and therefore inappropriate to this hearing.

Q. If and when you come to take the oath of office as an attorney, do you consider that you will be bound to the promises made in that oath, by taking the oath, any more than if you were not required to take an oath?

A. Probably not. I think I would respect the oath fully in both situations.

Q. Do you think that an oath of office for an attorney at law is an entirely superfluous matter?

A. I am not suggesting that.

[fol. 214] Q. What do you suggest?

A. I am only suggesting that since I would take my duties as an attorney fully, I would regard them with the greatest degree of seriousness; whether I took the oath or not. In my own case, in a way, that is what I have been doing: that is, I see what I have been doing before this committee as fulfilling the duties of an attorney, and contributing to the welfare and health of the Illinois bar. And I would not be any less inclined to do so if I were in the bar.

Q. So that your position, as I understand it, is that in so far as you, George Anastaplo, is concerned, the matter of whether you take an oath as an attorney at law, or do not, take an oath as attorney at law, makes no difference?

A. That is, in a way, right, Mr. Young, but you put it the wrong way. I am saying that I would respect my duties as an attorney fully with or without an oath. I am quite willing to take the oath. I have offered to take the oath and if you care to administer the oath, I will take it right now. But I still can say that I will respect my duties as an attorney as much with an oath as without an oath, and vice versa.

Q. Now, what are the sanctions that stand back of the oath of office, so far as you, George Anastaplo, is concerned?

A. There are the two that I have indicated. There is the possibility of perjury, which I wouldn't consider very serious; there is the matter of good conscience, to use the modern term, which is more important. And there may be a religious tie, or threat, or sanction, which I would not care to speak to.

Let me also add that we are but one step now away from the old transubstantiation controversies of the last century and centuries before, in England; that is to say, if you [fol. 215] begin to ask questions about one's belief in God, and so forth, or imply that it may be a problem for consideration, it is one step further to inquire into the nature of this God or this belief that you are inquiring into.

Commissioner Stephan: One thing that I think is perfectly clear, and I hope it is to you, and that is that this committee is not exacting a religious qualification for the office of attorney in this state. That is emphatic, and I

want it to be absolutely clear both in your mind and on the record.

Mr. Anastaplo: Except that I have been asked—

Commissioner Stephan: But I do want to make clear, also, that what I think leads to this line of questioning is that the oath has become of importance in two or three contexts. One, you are sworn before this committee; two, you are to take the oath as an attorney if you are admitted; and thirdly, as an attorney, you will be constantly confronted with the importance of an oath.

Mr. Anastaplo. Yes.

Commissioner Stephan: I think the point of the question is to find out how you view an oath, what sanctions attach to it, and what significance it has for you. That is all there is to it.

Commissioner Moses: Mr. Chairman, I would like to say, as far as I am concerned, as a Commissioner, the refusal to state any further sanctions behind Mr. Anastaplo's particular oath, in my judgment, has a substantial bearing upon his fitness to practice law. And I base that, in part, upon what I regard as the philosophy of the Summers case, which went up from Illinois. I don't want to argue it; for your information, I am stating that.

[fol. 216] Mr. Anastaplo: For my information, would you care to state, what other sanctions are you thinking of beside the two I have mentioned? It may be there are sanctions which I would agree with if you mentioned them, which I have not thought of. What other sanctions are there that I have not mentioned?

Commissioner Moses: A belief in the Deity.

Mr. Anastaplo: I see. Then aren't you, in effect, asking me to speak to the question of whether I believe in the Deity?

Commissioner Moses: You may interpret it that way, if you wish. I don't intend to be questioned about it. I am giving you my own view that a man who takes an oath without a belief in the Deity, is going through an empty form; he is not in good faith taking an oath; and I also say that one who would do that, in my judgment, would be unfit to be a member of the bar. And I say further, that if it is more important to him not to reveal his views on that subject, because in his opinion the First Amendment plus the Four-

teenth keeps him from having to do so, that bears, in my opinion, only, as a Commissioner, upon his fitness, and I want to give you that information at this time so that you can't feel that I withheld it from you.

Commissioner Stephan: You understand that those views are the views of Commissioner Moses, and not necessarily the views of the committee.

Mr. Anastaplo: But this is the problem, that I have to decide whether it is the view of the committee, or not.

Commissioner Weiss: At this time, Mr. Chairman, can we go on with other questioning?

Mr. Anastaplo: May I ask Mr. Moses, then, a question to inform me. Is he suggesting that I should tell him what my views of the Deity are?

[fol. 217] Commissioner Moses: I didn't ask you your views of the Deity. I asked you whether or not, in your case, the oath contains the sanction based upon a genuine belief in a Deity; I am not asking you to describe the Deity, or anything about the Deity, but whether or not the oath has that sanction behind it in your case. I think that bears upon fitness.

Mr. Anastaplo: I see. Then are you, in effect, asking me whether I believe in God?

Commissioner Moses: I am not asking you anything. Mr. Young asked you a question; you have answered it by refusing to answer, if I understood you, any additional sanctions, because you said you may have additional ones, but under the First and Fourteenth Amendments you refuse to reveal them. I say to you, I am not asking you to do anything. I am telling you that as far as I am concerned, as a Commissioner, that refusal to answer appears to me to be important. I don't say that it's controlling; I say that it's important.

Commissioner Stephan: Commissioner Christianson, do you have a few questions?

Commissioner Christianson: Yes, I have several questions.

By Commissioner Christianson:

Q. Mr. Anastaplo, I have read the record in this hearing in its entirety over the last week-end, and I believe it will

be helpful to both of us if I make a brief statement before I interrogate you further.

First of all, I am not satisfied with the record as it stands. The hearing has developed to a considerable extent into a problem of semantics and an exercise of dialectics, much of [fol. 218] which does not assist this committee in determining your character and fitness to practice law. This is in part due to your lack of precision in answering questions or in making statements or objections.

I want you to know that my mind is still open on the question before the committee, and to me the principal problem relates to your views on the procedure of this committee, and your claim of right to refuse to answer its inquiries, and the bases for this claim. There exists a shadowy line, which I say is still too shadowy for me, between the extremes of your being willing to answer any question put to you, and your unwillingness to answer any questions. I am trying to sharpen that line by a line of questioning. I have come to the conclusion that the simplest method is to ask you certain questions, some of which are hypothetical. Your answers to these questions will help me, as a member of this committee, to give you the fair and impartial hearing you are entitled to. I would like to have you answer them as briefly and as precisely as you can.

You are familiar with the case of *In re Latimer?*

A. I think I read it once. I am not very familiar with it.

Q. Let me suggest to you that in that opinion, the Court says:

> "He"—meaning Latimer—"attempts to interpret Rule 58 to mean that upon filing the application and supporting affidavits, in the absence of complaints (presumably from others), the Committee should confine its inquiry to the documents so filed. There is no such stricture in the Rule. It is not only within the committee's power but is its duty to make such inquiries and investigations as seem necessary to pass upon an application for admission."

And further, the Court says:

> "Applicant's"—meaning Latimer's—"tactics were not only unjustified but also are contemptuous of and

prejudicial to the orderly administration of the in-
[fol. 219] vestigation provided for by this court under Rule 58. Such actions reflect adversely on the character and fitness of applicant, and, aside from any other considerations, tend to prove applicant's want of moral fitness."

Now, do you agree, or do you quarrel with the statements of the Supreme Court in *In re Latimer*?

A. It is possible that these things may have bearings on the case, certainly.

Q. That is your answer?

A. Yes, sir. Are you suggesting there is anything of this kind in this case?

Q. I am not suggesting anything. I am just going to ask you some questions. You do quarrel with these statements in some respects?

A. I am saying it would not be applicable in all cases. For instance, in the case where there is a Supreme Court order specifying what is to be discussed, such as is the case here.

Q. All right. Now, on page five of the material you presented to the committee since its last hearing, you state:

"Perhaps the simplest solution—if the existence of character committees is accepted—"—

I am assuming that is unquestioned, as far as you are concerned—

"would be the acknowledgment of a general presumption of satisfactory character and fitness, a presumption that a committee might challenge with respect to a particular applicant by bringing forward particular complaints and facts."

Do I understand you to mean that it is the duty of the committee as presently constituted and functioning under Rule 58, it is a requirement of the committee to bring forth particular complaints or facts to the applicant before it can ask him questions? Is that what you mean by that statement?

A. This is where, now?

[fol. 220] Q. This is a statement on page five of the material which you gave us.

A. I have given you a considerable amount of material.

Q. I will try to find it. I grant you, you have given us a considerable— Do you remember the statement, which I quoted verbatim from your statement?

A. If it is where I think it is, it is really not relevant to your problem right now.

Q. Your answer is, then, this is not relevant?

A. If I recollect correctly, that statement is in the letter, one of the two letters I wrote to a member of the Supreme Court of Illinois, in the summer of 1955, suggesting changes in committee procedures and standards.

Q. But are you suggesting that it is the duty of this committee, before it inquires of you, that it bring forth particular complaints or facts, to you?

A. I am suggesting there only that it would be better if this were the case, certainly with respect to inquiries in the areas relating to political matters.

Q. Now I am reading from page four of—

A. Let me amplify the answer. I might further suggest that I think under the Constitution, that such a requirement is probably necessary for inquiries into First Amendment subjects.

Q. You have prepared a statement which says, "Remarks by George Anastaplo, prepared for presentation to the Committee on Character and Fitness, at the beginning of the meeting of April 7," and I am reading from page four of that, in which you say:

> "The committee have more than enough evidence and reason to certify me for admission, however mistaken I may be in not answering a question which I consider unconstitutional, unfounded, dangerous, insulting and irrelevant to the issues."

[fol. 221] Now, do you believe that you or any other applicant—of course it would be implicit for all applicants—have the right to refuse to answer questions of this committee which you or any other applicant believe to be either unconstitutional, unfounded, dangerous, insulting or irrele-

vant to the issues? Is that an accurate statement of your position?

A. I should hope that more applicants would resist such a question, yes, sir.

Q. On any one of those grounds?

A. Certainly when the grounds are all put together.

Q. One last question. Assume that a member of the committee, with absolutely no background information or material, and actuated only by his non-expert observance of the applicant, is concerned as to whether or not an applicant is a homosexual, and asks a question, this simple question, of the applicant, "Are you a homosexual?" Does the applicant have the right to refuse to answer this question, and if so, on what basis?

A. He might or might not. I am really not so very much concerned about that, simply because it is not in the political or religious realms.

Q. And if he refuses, may the committee consider his refusal in determining his character and fitness to practice law in the State of Illinois?

A. Certainly they can consider his refusal, but the refusal in some circumstances could be a piece of evidence for the applicant as well as against him. I would say that in this case, under the circumstances, it has come to be evidence for my eligibility to practice law, rather than evidence against it.

Commissioner Christianson: I have no other questions.

[fol. 222] Commissioner Stephan: Commissioner Rothschild.

Commissioner Weiss: Can the answers be in two or three minutes? Otherwise I will have to be excused.

Commissioner Stephan: All right, put your question.

By Commissioner Rothschild:

Q. Mr. Anastaplo, two things trouble me. One is, which is suggested by—they may be the same—but one is suggested by your answers to particular Supreme Court cases, where you seemed to dispose of them by agreeing with the dissenting opinion, or brushing them off, giving me a feeling of uneasiness about your willingness to abide by what-

ever the finally defined law is, either as a citizen or as a lawyer. The other one that bothers me is a recurring statement in the first hearing about the motivation of this committee and of the Court and casting light on our purposes and the Court's opinion, and so forth. I just want to ask you whether you feel that the Supreme Court of Illinois, and this committee, have not conscientiously considered the position, your position, either in the original case or in these proceedings?

A. I will be glad to speak to both questions implicit in your comment. I will take the last one first. I would say that the statement issued by this committee in 1954 was one of the most unfair legal documents that I, in my legal experience—in my limited legal experience—have ever seen. It deliberately ignored many aspects of the case, left out or ignored evidence that was favorable, did not mention the other questions that were not answered, and otherwise gave a misleading appearance about what this whole case was about. Consequently, the Supreme Court of Illinois, I submit to you, was mistaken and in a sense misled about the applicant in the statement of this committee. As a [fol. 223] result, the Supreme Court of Illinois issued an opinion, which, in my opinion, was wrong. It was an opinion which included, among other things, a drastic error as to the sequence of questions that had been before this committee. The Supreme Court of Illinois said that the applicant was asked about his views as to the right of revolution only after he had refused to answer questions about his affiliations. But just the opposite was correct, which is very apparent in the first few pages of the first meeting before this committee. The applicant refused to answer questions about affiliations after those questions were asked because the committee did not like what he said about the right of revolution.

A conscientious committee would have called this to the attention of the Court, a critical error of this nature. I tried to call it to the attention of the Court, but it would have been much more effective and much more conducive to bringing the truth out if this committee had tried to call it to the attention of the Court.

Now, as to the first question, it is true that I have—

Q. Now, wait. Before you go from that. What, in your view, is the motivation behind either this committee or the Court, in not treating this conscientiously, as you suggest?

A. I say, the Court was misled, and consequently—

Q. You almost have to say "deliberately misled," don't you?

A. It was misled. I will get to the point of the deliberation in a minute. The Court was misled, and also, the Court was obliged to lean over backwards to support what its committee had done, if only out of gratitude for the very great amount of work these committees do. They certainly have to take into consideration whatever this committee says.

Commissioner Stephan: Are you suggesting that the [fol. 224] Court didn't read the record?

Mr. Anastaplo: I am saying that the very critical error was made in the sequence of the questions.

Commissioner Stephan: Which, with seven Justices looking at the record—

Mr. Anastaplo: Which is vital, and which I can point out to you very simply. It is something upon which reasonable men cannot differ, if they have it pointed out to them.

Commissioner Stephan: You must make the assumption that the seven Justices did not did not look at the record, if the mistake is so glaring.

Mr. Anastaplo: If I should get down to Springfield, and if the Court should ask me, I should be obliged to tell them that they were misled and that for various reasons they seemed to have been inclined not to question as sharply as they should have the committee's finding. Now, as to the reasons for the committee's finding, one thing I believe is, that the committee—that certains members of the committee made a mistake. They asked questions, they got answers, and then the issue was joined, and there was no way of disengaging. For some of them, I suggest it may have been a matter of face saving. Here was a young applicant, who was presuming to match his judgment against theirs. There was; I understand, among the committee, a certain amount of concern whether this question about affiliations, when it did come up, was proper or not. And Mr. Love's statement that I have submitted before, reports some of that concern. Once the issue was joined, once an issue had been made of it,

at a time when there was the excitement of the Korean War, which you must grant could lead people not to exercise their judgment as well as they might in other matters, and the fact that they had committed themselves, and the fact that [fol. 225] they were busy men who have other things to do when these are not very important things for them, in the sense that they want to put to them the time that is required to understand them—perhaps all these factors, among others, led them to a mistake both in facts and in judgment.

I suggest that the motivation may differ among committee members. I do say it was not a fair report, and that it did not do justice to the issues in the case. That is, the report of 1954.

As to the first question, I have, of course, from time to time, questioned certain Supreme Court decisions. I question the Summers case. I think it really was a very bad decision, unfair both to Illinois and to Summers. I question the Douds case, on the facts. But even if you assume the Douds case, I would say, it doesn't apply to this case. The Douds case dealt with a defined loyalty oath for men who wanted to use the N.L.R.B. proceedings, who would still remain union leaders even if they refused to take the oath, an oath which was prescribed by Congress, and with respect to which there was no option left on the part of anybody as to the administration of it. That is not the situation here. The questions as to affiliations here are not necessary, and even if the Court says they are proper, this does not mean they are necessary, and even if the Court says they are relevant, it doesn't mean that the refusal to answer such questions is evidence adverse to the applicant. It may be, in the circumstances, evidence for the applicant if the refusal to answer is on principle in circumstances where the situation seems rather obvious about what is happening.

I should also add that of course, as a lawyer, as well as [fol. 226] a client, I am willing to make a realistic appraisal of what the law is, what the Supreme Court cases are, what is likely to be ruled, and as a lawyer I would be obliged, both in advising my client and in informing myself, to take a realistic account of what is likely to happen in any particular line of litigation. It does not mean that I am not free, I am really obliged, I am obliged to stop and ask my-

self, "Is this case consistent with the Constitution? Is it likely to be overruled?" And the interesting part about the matter is, the position that I took in '50-'51 with respect to this matter, the broader issues, has been, in effect, not at all points, but in the large, in the main, has been substantiated by the Supreme Court of the United States, in the Konigsberg, Schware, Patterson, and the Yates cases, as well as the Sweezy case, for instance. I mean, that even in the matter of the practical day to day prediction of what the Court will do when it ruled on the matter, I have been realistic, and that even on that ground I don't think I have been at fault, although mistakes in judgment on these matters speak nothing as to character and fitness, of course.

Q. I don't think he answered the question.

A. I am sorry, I thought I answered the question.

Q. What worries me, is, every time I lose a lawsuit, I think the Court is wrong, but I don't think the Court is unconscientious. That worries me about you.

A. I am not saying the Supreme Court was not conscientious in this case.

Commissioner Stephan: What about this committee? What about this committee?

Mr. Anastaplo: I have tried to explain at this time. This is really a difficult problem.

[fol. 227] Commissioner Stephan: If you don't care to answer it, forget it.

Mr. Anastaplo: No. No.

Commissioner Moses: Mr. Chairman, may I suggest that the question as to the present committee at the present time is not a fair question. I would like to have it withdrawn.

Commissioner Bane: Whether it is fair or not, I think it is probably difficult for the witness, in advance of knowing what the action of this committee is going to be.

Commissioner Stephan: I thought that was the question put to him. Was it?

Mr. Anastaplo: I am willing to speak to it to the extent that I am able to speak to it.

Commissioner Stephan: I'm not asking that you answer it. I was attempting, I thought, to paraphrase Com-

missioner Rothschild's question. If that isn't his question, I don't want to put it in his mouth.

Mr. Anastaplo: I would only say that I think some of the methods, some of the inquiries that they used have been fundamentally unfair, whether you know it or not.

Commissioner Stephan: Well, we are going to adjourn the hearing now. At the next hearing, Commissioner Moses has a few questions to put to you, and there might be a few more. We are going to make an effort to wind up this matter at the next hearing; whether we will, or not, remains to be seen.

At the next hearing you will have an opportunity to enter whatever objections you care to, to the course the proceeding has taken, to questions that have been put, to evidence that has come into the record. You will have an opportunity to make argument, if you care to make one. You will [fol. 228] have an opportunity to submit a brief of memorandum of law, following the conclusion of the next hearing.

Commissioner Bane: Mr. Chairman, shouldn't we also tell the applicant that if he wishes to produce any witnesses—

Commissioner Stephan: I was going to come to that, yes. If you care to bring in any witnesses to testify upon any of the matters that have arisen at the hearing, or any matters that haven't arisen that you think are relevant to our consideration, you are welcome to do so.

Mr. Anastaplo: May I ask three points? One is—three points for your consideration. One is that you indicate to me any tactics or answers that you think leave an unfavorable impression, that I may be able to speak to them at this time. Secondly, that you indicate to me whether you find anything in that logical analysis that I gave you earlier today, that is not appropriate, in which there is a loophole. Are there any factors I have not taken into account in my logical analysis? And three, I should like to have you read the opening pages, those of you who have not had time before now to do so, read the opening pages of the first hearings before this committee, in 1950, and see whether it is unreasonable for me to claim that these entire hearings, particularly the questions about affiliations, arose

only after and only because of answers I made, which were, in effect, defense on the Declaration of Independence.

Commissioner Stephan: Well, I think that this committee has to reach a decision on your application, on the whole record. I don't think that you are entitled to, let us say, a progress report after each hearing as to how you are doing. I don't think we can possibly get ourselves into that [fol. 229] position; for one thing, we have not deliberated as a group to any extent, and that type of question could be answered only after such deliberation.

Mr. Anastaplo: May I ask, perhaps, if any member of the committee thinks they have things I should know about with respect to any of the three points, I should be glad to be told of it.

Commissioner Bane: Mr. Chairman, the applicant is asking us to tell him what points he should argue on and I think I express the feeling of the committee when I say that we will remind the applicant that it is his burden to establish his character and fitness; it is for him to determine whether he believes that on this record he has established it; it is for him to determine, if he concludes on this record that he has not established it, to then come forward with whatever evidence, witnesses and testimony he wishes to do so. And I think our function today, Mr. Chairman, should be to tell this applicant that at the next hearing he is to have that opportunity.

Commissioner Stephan: Well, I have told him that, I hope.

Mr. Anastaplo: May I add then, finally, that the comments I made, particularly the last time, about the right of revolution and the Declaration of Independence, relate intimately to the attempt by the chairman, last time and the time before, that is, the hearings in March and the first part of April, to the attempt by the chairman to give a rationale for the questions about affiliations. That rationale included a reference to the history of the case. In fact, it rested primarily on the history of the case. And I am suggesting to you that the history of the case should be [fol. 230] properly examined with respect to this point about the Declaration of Independence. You might be thereafter inclined to ask questions relating to this matter, if I am wrong, or if you think I am wrong.

[There was discussion, stated to be off the record.]

Commissioner Moses: In view of what Mr. Anastaplo has to do before the next hearing, I think he will need extra time.

Commissioner Stephan: How much time?

Mr. Anastaplo: About two weeks, as long as I have the transcript before then.

Mr. Cain: Suppose we let George let us know when he is ready. We will be meeting more frequently and probably not have a lot to do.

Commissioner Stephan: We will set a date at the next hearing and notify him.

Mr. Cain: After he has said he is ready.

Mr. Anastaplo: The main thing will be the transcript.

Commissioner Stephan: You advise the Secretary when you are ready, and we will advise you when to appear.

[The hearing recessed at three-thirty o'clock.]

[fol. 231]

BEFORE THE COMMITTEE ON CHARACTER AND FITNESS

FIRST APPELLATE COURT DISTRICT OF ILLINOIS
SITTING AS COMMISSIONERS OF THE
SUPREME COURT OF ILLINOIS

In re: GEORGE ANASTAPLO (Session V)

Proceedings: May 19, 1958

Reported by: Mabel A. Lesser

Present:

Commissioners James P. Carey, Jr., J. R. Christianson, Richmond M. Corbett, James E. Hastings, Walter H. Moses, Edward I. Rothschild, Calvin P. Sawyier, Len Young Smith, Robert A. Sprecher, Edmund A. Stephan, D. Robert Thomas, Jerome S. Weiss, Horace A. Young.

*****

Richard H. Cain, Secretary.

*****

COLLOQUY

Commissioner Stephan: Good afternoon. The hearing will come to order, please.

Commissioner Young wishes to correct some material that was put into the record last week. I will ask him to do that at this time.

Commissioner Young: Mr. Chairman, at page 210 of the record, I cited the case of *The Central Military Track Railroad Company* v. *Rockafellow,* 17 Ill. 541, and read from page 554. I stated later on that page that I did not find that that rule had been overruled or modified. Upon further investigation, I find that the rule has been modified in *Hronek*—H-r-o n-e-k—v. *The People,* 134 Ill. 139, at 150. I [fol. 232] wish to make this correction for the record.

Commissioner Stephan: Thank you.

Mr. Anastaplo: I wonder if I may, on the basis of that correction, Mr. Chairman—about which I should like to say more in a few minutes—move that you rule that the inquiries into my religious beliefs are improper and irrelevant.

Commissioner Stephan: Well, I would like to delay that, with your permission, until we finish with the questioning, and then we can get back to any of these matters which you have objection to. We have a few more questions to put to you, and I think it will make a more orderly hearing if we dispense with those.

Mr. Anastaplo: May I ask one question? That is, I have several remarks to make about the use of that case last time.

Commissioner Stephan: You will have an opportunity to make them.

Mr. Anastaplo: Well, the only thing I would like to find out is, I would like to make certain that Commissioner Young is here when I make them, inasmuch as I do not want to seem to be unfair in what I say—I mean, I do not want it to seem I am taking advantage of his absence in bringing these suggestions up.

Commissioner Stephan: Well, we will just have to see how that works out. Do you intend to be here, Commissioner Young?

Commissioner Young: I expect to be here at all the hearings.

Commissioner Stephan: Commissioner Moses, do you have some questions to put to Mr. Anastaplo?

Commissioner Moses: Yes, I do.

[fol. 233] By Commissioner Moses:

Q. Mr. Anastaplo, one of the questions in the questionnaire that you replied to, read: "Do you now without any mental reservation and will you hereafter loyally support the Constitution of the United States and the Constitution of the State of Illinois?" You answered that question, "Yes." Do you recall that?

A. Yes, sir.

Q. That continues to be your answer to that question?

A. That is true, sir.

Q. Now, you have told us at considerable length about your views as to the right of revolution. I have brought with me today, copies of the Constitution of the United States and the Constitution of the State of Illinois. I would like to ask you to read to me from both documents, or either document, the portion upon which you premise your views as to the right of revolution without involving you in any mental reservation in your undertaking to support those two Constitutions, and I suggest you start with the Constitution of the United States.

A. Yes, sir. I should like to start with something even earlier than the Constitution of the United States.

Q. No. I would like you to answer my question. My question relates to the Constitution of the United States, not to the Declaration of Independence, not to St. Thomas Aquinas, or anybody, except the Constitution of the United States.

A. I see. In other words, you do not want me to compare the Declaration of Independence with the Constitution of the United States.

Q. You have already told us about the Declaration of Independence, and your views about it.

A. But as a constitutional document, I should say. Furthermore, if you—

[fol. 234] Q. I do not regard the Declaration of Independence as a part of the Constitution of the United States, no.

A. I did not say it was part, in that sense, in a most technical sense. However, if you want citations, I can give you some.

Q. I would like you to read from the Constitution of the United States.

A. Certainly. Article IX of the Articles in addition to and amendment of the Constitution of the United States; it is there stated: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." I would say that a proper interpretation of that would include that right which had been so recently invoked and which is classically enshrined for us in the Declaration of Independence.

Furthermore, I should like to read from another part of the Constitution, the Preamble:

> "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

I submit, any government set up pursuant to this Constitution, or in defiance of this Constitution, which proceeds to disparage, deny, or otherwise destroy, in a vulnerable sense, any part of this Constitution, should be, by the people of the United States, opposed, in the name of the Constitution, which I take it is what the right of revolution means.

Q. Even to the extent of forcible overthrow?

A. Certainly. If the Government of the United States usurps the Constitution, that is, usurps the constitutionally-provided powers given it, and thereby it becomes uncon- [fol. 235] stitutional, the people have a right to re-establish the Constitution. Do you want more citations?

Q. I would like to know where everything in the Constitution of the United States, upon which you justify your

views as to the right of revolution. And when you have given me all, then I expect you to stop.

A. I see. In a sense, I could read the entire document.

Q. Well, if you have in mind the entire document, you can just say so.

A. O. K. The entire document, in the sense that it is related to the sense in which I have just related to the Preamble. That is to say, the entire document sets up a scheme of government, which, if attacked, or otherwise undermined, would call—demands, in a sense, the people to overthrow it—to overthrow the government and to re-establish the Constitution.

In particular, of course, there is the division among the various branches of government of the powers in the Constitution, which would require the right of revolution in some extreme instances, say on behalf of the Judiciary, when the Legislature or the Executive usurps judicial functions.

Q. If I understand what you mean, if the Supreme Court of the United States held that certain executive action was unconstitutional, and the executive continued to engage in that action, you would regard that as usurpation?

A. Under our present scheme, it would be usurpation.

Q. That is the kind of thing you mean, in answer to your last answer?

A. No, not necessarily. That would be the kind of thing, but not necessarily call for use of force. I mean, I would like to make it clear, the use of force comes about only in [fol. 236] extremely rare circumstances. The important thing is that the possibility of it should be recognized as one more restraint upon unconstitutional usurpation.

Of course the Bill of Rights itself, is, in a sense, in support of the Declaration of Independence, not only because of Article IX, but also Article X, where certain powers are reserved to the States or the People. Presumably a State or a People could exercise certain powers in order to overthrow a government that had become, say, tyrannical and had set aside the Constitution.

Q. Have you completed your answer now with respect to the Constitution of the United States?

A. All I can think of, offhand.

Q. Now, will you turn to the Constitution of the State of Illinois, please?

A. Well, there, many of the same considerations apply. The Preamble there as against the Preamble of the National Constitution—there are similarities. There, again, also is practically the entire document, when it is being usurped. There, again, with respect to certain rights, such as Section 1, Article II, where it speaks of all men being by nature free and independent, having certain inherent and inalienable rights. And I assume one of those rights would be the right of revolution. There is a special circumstance, of course, with the Illinois Constitution that is not found in the National Constitution, and that is, there is provision made in the Federal Constitution for congressional—I believe it is congressional control, over unrepublican tendencies in state governments. That is to say, if the state government should usurp the State Constitution, there seems to be a more direct, non-violent method available to correct that, that is by petition to the National Congress, and correction by it might, I presume, be perhaps by the use of troops, or simply by any other powers [fol. 237] that the Congress has at its disposal.

Q. Of course the first ten amendments should not apply to the states, which is another difference, it seems to me, to bear on this problem.

A. Well, no, this provision I am talking about is in the body of the Constitution itself.

Q. The question I asked, is, the first ten amendments to the Constitution of the United States do not apply to the states, except in so far as the Fourteenth Amendment embodies them.

A. Certainly in so far as the Fourteenth Amendment embodies them, they apply to the states.

Q. That is right.

A. But that certainly is a minimum. There is a school of thought that says that all of them were intended to apply.

Q. There are lots of schools of thought about a lot of things. That is not the view of the Supreme Court of the United States, as you understand it, is it—at least as recently as last Monday?

A. Yes, as of last Monday. I would have to study again the Adamson case to know what the views of the Supreme Court are on this particular problem.

Q. Have you completed now, the State of Illinois Constitution?

A. I have completed all that I have at hand. If you like, I could make a more thorough study for this purpose.

Q. That is entirely up to you. I would be glad to have you do that, if you feel it would be a fair statement of your attitude on the subject.

Now, viewing this same question in a little different context, in answer to questions by Commissioner Seiter a couple of sessions ago, you took the position, as I under- [fol. 238] stand it, that you are not prepared to say that there might not be final determinations in proceedings to which you were a party, where the review had been completed and the decree or judgment was final, and where it was being put into effect through an official charged with the duty of executing the commands of the Court, you might not be prepared forcibly to resist such executive action. Do you recall that?

A. I might not be prepared to—

Q. That you could conceive of circumstances under which you would feel justified in forcibly resisting the enforcement of judgments or decrees against you, personally.

A. I would say it's conceivable, yes; remotely conceivable.

Q. Do you conceive that to be consistent with your answer that you are prepared loyally to support the Constitutions of the State of Illinois and of the United States, without any mental reservation whatsoever?

A. Certainly.

Q. Would you amplify your answer sufficiently to make clear the basis upon which you arrive at that conclusion?

A. Well, in order to amplify that, I would have to know what the problem is. I mean, I see no problem here.

Q. If that answer satisfies you, it satisfies me.

A. That there is no problem.

Q. I say, if that's the answer you wish to give, I am willing to take it.

A. All right. I say, I see no problem, and if you are satisfied with that answer, I will gladly let it go at that.

Q. I want to make clear what I mean by saying that I am satisfied with the answer. I don't desire to probe further if the answer satisfies you; whether or not that answer is sufficient to explain to me your view, I did not mean to suggest by saying that if the answer satisfies you, it satis- [fol. 239] fies me. What I mean is, it satisfies me as to the extent to which you wish to make clear your position. That's all.

A. And the position is only one point.

Q. To-wit?

A. It seems to me, these two answers I have given from time to time are consistent.

Q. You have also said, however, that if you were advising a client, in your capacity as a lawyer, you would not advise a client that he would be justified under any circumstances—if I understood your answer to Commissioner Seiter—in resisting forcibly the enforcement by the proper executive official of a judgment or decree, final judgment or decree, after complete review in a case in which he was a party; is that right?

A. That is true.

Q. Are you arrogating to yourself a different standard than you are to him?

A. Certainly. I am "arrogating" a different standard to myself as a citizen than I am to myself as a lawyer.

Q. He comes to you as a citizen.

A. He comes to me as a lawyer, because he is my client.

Q. He, as a citizen, comes to you, as a lawyer.

A. Certainly.

Q. He wants to know what his rights as a citizen are.

A. I would tell him, in so far as I am a lawyer, I can tell him what his rights are under the accepted law, and what I think the law is likely to be in the foreseeable future; I think under the Canons of Ethics I would be derelict in my duty if I presume to do much more than that.

Q. Do I understand that he, as a citizen, is subjected to [fol. 240] a different constitutional obligation than you are, as a citizen?

A. Certainly not.

Q. And yet, the advice you would give him would be different from the rights which you arrogate to yourself, under the same document.

A. That is true. As a lawyer, I would give him certain advice. As a citizen, I would give him, and others, different advice—not conflicting advice, necessarily, but supplementary advice.

Q. In other words, you conceive that you have certain rights as a citizen that are over and above the law?

A. I conceive I have certain rights as a citizen that might call into question the validity of certain laws, yes, sir.

Q. Suppose he comes to you, Mr. Anastaplo—again I am not clear as to your answer—he comes to you and he wants to know what his rights are under the Constitution of the State of Illinois and the Constitution of the United States, with respect to this decree that has become final against him and with respect to which a marshal is on the way to physically attempt to enforce it?

A. If there is some legal way of opposing the enforcement, I would try to suggest it to him. If there were no legal way, that is, legal in the sense that it conforms with the presently-operating legal system, then I would have to say that my function with respect to this matter has come to an end. If, however, he were thereupon to approach me on some other basis, not as an attorney, there may be other advice I would be willing to give him.

Commissioner Moses: No further questions.

[fol 241] By Commissioner Young:

Q. Mr. Anastaplo, if the matter of enforcement of the order were to come against you, as an attorney, if that can be distinguished from the position of citizen as Mr. Moses was putting it, would you still reserve or arrogate unto yourself the right to resist that order, as an attorney?

A. As an attorney, I think I would be inclined to conform to the then operating legal system—as an attorney. That does not mean that as a citizen I will still not have questions about it and that I might not even do something about it that an attorney would not do.

Q. As you sit there now, do you think that you could distinguish between your action as a citizen, and as an attorney?

A. Certainly, I should think so.

Q. You are not very sure about it.
A. I said, I should think so.

Commissioner Young: I have nothing further.

By Commissioner Stephan:

Q. What kind of thing do you have in mind when you say that you, as a citizen, might resist a decree of court as distinguished from what you would do as an attorney? We have been talking now for ten minutes about this situation. I am not clear just what kind of a matter we are talking about.

A. I mean, I assume that these gentlemen are talking about a matter in which there had been a constitutional decree with respect to a vital matter, and that the person affected is thereby going to be unjustly and unconstitutionally penalized.

Q. In your own mind, do you analogize this situation to the type of matter that would give rise to overthrow of the government by force? I mean, would it be of equal seriousness or severity?

[fol. 242] A. Well, I take it, in the examples that were being put, in which I indicated that resistance would have, might have to be taken, it could be one incident, or one grievance that could lead to overthrow of government.

Q. In discussing overthrow of the government with you, or in questioning you about your views, I gained the impression that the kind of evil that you thought justified violent overthrow was a very pervasive thing that affected wide segments of the community. Whereas here, I gain the impression, from hearing you, if one person was adversely affected by a decree, let's assume it was an unconstitutional decree, an arbitrary decree and one without any precedent in law, if only that person were affected, and not the community as a whole, or a large segment of the community, do you think this person would have a right to resist it?

A. It would depend on how serious the right is and how —rather, how important the right is, and how serious the infringement is. I mean, I think—simply on the grounds of prudence and social responsibility—it would be hard to

assert the case where the injustice to one person would be that critical. But there have been cases of that type where even injustice to one person, or to a minority group, or to a minority sect, has become so vital as to threaten the government under which the injustice was perpetrated.

Q. You quoted authors who I think have remarked that the community has to put up with a great deal of evil and oppression before it takes arms against its government; is that correct?

A. Certainly. And that's a minimum one should expect if one—

Q. Do you want to apply that doctrine to this individual case?

[fol. 243] A. But definitely. But let me also note that I quoted one author who, in one instance, said, every case of idolatry calls for resistance. He spoke nothing there of social consequences; and such a case may be one that you should consider seriously. Of course, that is Aquinas, whom I have indicated is much more radical on this doctrine than I am.

Commissioner Stephan: Are there any other questions? Do you have any further evidence to present to this committee, Mr. Anastaplo, at this time?

Commissioner Sawyier: Let me ask just one.

Commissioner Stephan: Commissioner Sawyier.

By Commissioner Sawyier:

Q. Mr. Anastaplo, under the system of appeal, and so forth, on the questions Mr. Moses asked you, it isn't very likely, there is only a remote possibility, as I understand it, that any one situation of resistance to a final order would ever be justified?

A. That is true.

Q. I mean, I can understand the situation such as that in Nazi Germany, where a man is arrested and sentenced and although there are appellate courts, and so forth, they are just not functioning; is that the kind of situation you have in mind?

A. Yes, but even in Nazi Germany I would be cautious. That is to say, I mean, I think in Nazi Germany, the Jews, just as well as the "good" Germans, as they were called,

should have resisted. But I think a prudent guidance of that resistance was also necessary, not blindly or recklessly; I mean, there are times when you have rights which have to be foregone, simply because of social considerations. Even before a bar commission, such as this one, I would say that there are rights which I have defended, which, under other circumstances I might decide not to [fol. 244] defend, simply because social consequences that follow might be more harmful to the bar and to the state in my defense. I think that is not the situation in this case.

By Commissioner Moses:

Q. The difficulty that I have, Mr. Anastaplo—suppose a person sincerely disbelieves in capital punishment; suppose we add to that, that he is accused of a capital crime of which he knows himself to be innocent. Nevertheless, he is given due process of law but convicted and sentenced to death. Would that, according to your thinking, represent the kind of improper attack upon an individual that he would be justified in resisting forcibly?

A. It would depend on what the crime is, and what the circumstances are. If the individual is Jesus Christ, then resistance might be in order.

Q. Well, are there any other—

Commissioner Stephan: Lesser creatures?

By Commissioner Moses:

Q. —circumstances under which it would be in order? I think we can agree, you are not Jesus Christ. We are talking about you.

A. I would agree, too. But I would add that it is well to look at the higher in order to determine what the lower should do. I would say that in this case you refer to, the problem not being that of revolutionary revolt—

Q. Of resistance?

A. —of resistance, there may be a question for him, as an individual, as to whether he should escape when the opportunity presented itself. I, myself, would be inclined to follow the doctrine laid down in the Crito, by Plato, [fol. 245] through the mouth of Socrates, and Socrates,

in turn, through the mouth of the law, where he says even unjust decisions on the part of the law should be acquiesced in.

Q. The difficulty that I have is in knowing what you mean by mental reservation in your answer to the questionnaire, and in understanding in any practical situation, where you stand. Now I tried to think up a possibility, and you have to fall back upon the conduct of Jesus Christ. In so far as he was a human being, living within the jurisdiction of the courts of the community, he was apparently given due process of law, and he himself did not resist, for reasons which he deemed sufficient. Possibly he could have successfully resisted. But at any rate, he didn't. So that it is a little hard to call upon that as an analogy, or the analogy of Socrates, who felt that he should not escape when he had the opportunity, but nevertheless drink the hemlock.

A. Yes, Mr. Moses, but you misinterpret my examples. In the first place, I have stressed all along that these are extremely rare circumstances I am talking about. If you push me for examples or for instances, I must go elsewhere for them.

Q. We are talking about character now, and fitness. I expect, certainly, every citizen to be honest under ordinary circumstances. He is only pressed to steal, if you please, when there are circumstantial pressures of a very severe kind—

A. That I question.

Q. —upon him.

A. That I would question.

Q. If he is a constitutional liar, or thief, like a kleptomaniac, he has a disease. Certainly, I have never thought that one deserved praise because in ordinary situations he acted honestly. I say, that is a minimum of conduct that [fol. 246] any man with character should have. The question is, when the going gets rough, then the issue of character begins to manifest itself, to me, at least.

A. I will agree to that.

Q. All right. What I am trying to find out is, what are the nature of the pressures, circumstantially, which, in your mind, enable you to take the position that you have taken here with regard to resistance, and which nevertheless in

your opinion justify you in saying that even though you take that position, it isn't inconsistent with supporting the Constitutions without mental reservations? I know no more about it now than I did when I asked you the question originally, and in fairness to you I must say I would like to know more, but I don't

A. Well, let me say a few more things, then. In the first place, I would agree with you that a person under pressure will show more about his character. I have been under pressure enough here to show what my character is like. It might be bad or it might be good, but certainly, pressure has been here.

In the second place, the reference to Socrates was not in defense of revolution. It was a situation in which he counseled against revolution or physical opposition to the laws when they were unjust, when they were unjustly applied.

In the third place, I have not made any mental reservations that I have not explicitly given you. The mental reservation is simply that there may be extreme circumstances of unconstitutional usurpation which a citizen would be obliged to resist. And he would do this in defense of the Constitution, and he would do this in order to win back for the people at large, as well as for himself, the constitutional rights which they have, through their negligence, permitted to be usurped.

Q. And that could happen under circumstances where he [fol. 247] was the only citizen affected, in the situation you talk about, by the particular decree of court which manifested the unconstitutional usurpation?

A. It conceivably could happen to one person, that that would be, somehow, a critical act of the government which for a thoughtful person would indicate that this government had gone over the threshold, beyond the domain, beyond the mansion of constitutional government.

By Commissioner Stephan:

Q. Do you mean something like the Dred Scott case? Would that be an example?

A. No, I wouldn't point—I know of no decree, offhand, in the history of American government, where such a single instance has occurred. No—I grant that it is hard to find

these instances. I think it is important to insist that there might be such instances.

By Commissioner Sawyier:

Q. Mr. Anastaplo, I think what is bothering Mr. Moses is the difference between a mistaken judgment of the court in the ordinary course of issuing what presumably are mostly correct decisions. There is no—maybe I am misconstruing it, but I can see the problem that is raised by what Mr. Moses is saying, the difference between the innocent man who is convicted and his sentence is upheld on appeal, and although he actually knows he is innocent, nevertheless he has been accorded a fair trial within the constitution, he has had a fair review, the courts are not rigged; in the sense that they are in Nazi Germany, they are operating within a constitutional sphere, and they just make a mistake. I think that this is the problem Mr. Moses is asking you to face. In that type of situation, would you consider resistance would be justified?

A. I have no problem with that kind of situation. As you describe it, it seems to me constitutional government [fol. 248] still exists in that country. The constitutional government does not mean there would not be mistakes made, and that there might not be injustice perpetrated. The thing to do there would be simply to push all possible legal means for appeal and thereupon for clemency, certainly.

By Commissioner Moses:

Q. Getting to the other problem of revolution that you expressed. Suppose, after the steel companies seizure decision by the Supreme Court of the United States, President Truman had insisted upon seizing the steel companies' properties. Would that be an act of usurpation that would call forth the right of armed resistance, in your thinking?

A. I hardly think so.

Q. Where would it fail to measure up?

A. I think that the constitutional government would still largely exist, both in form and in substance. What the President would be saying there, is, "I have as much

right to interpret the Constitution as the Supreme Court does." And there is for that, rather good precedent.

Q. Within the Constitution itself?

A. Certainly. The Constitution itself says nothing about judicial review.

Q. As presently understood, it doesn't?

A. It never has had anything to say about judicial review; judicial review has been interpreted. We would have to be reasonable about what the President would say. We would have to see how he would justify his position. I assume he would say that, "This is a government of divided powers; I am as much sworn to uphold the Constitution as the Justices of the Supreme Court; consequently, I have as much right as they do, under certain circumstances, to decide what is constitutional." I take it that is the way [fol. 249] the position would go.

Q. And that would satisfy you?

A. I certainly would not be inclined to participate in a revolution, that is true, under those circumstances. I might still disapprove of it, you understand. But that is something different from revolution.

By Commissioner Stephan:

Q. I have two brief matters to ask you about, Mr. Anastaplo. When you applied for your present teaching position at the University of Chicago, were you asked, either formally or informally, about possible communist affiliations?

A. At my—you mean, at University College?

Q. Right.

A. I was asked informally, and I do not know how seriously; yes, that is true.

Q. What answer did you give?

A. Yes, I was—I really hate to detail this, unless you understand properly the situation. That is to say, I was asked by the Dean of University College—who had asked me to come over for an interview for a position he wanted me to take, a position administering—helping him to administer a couple of hundred thousand dollars of research funds. His inquiry was an inquiry that was not taken

seriously by him, I want to stress this, because he is really too much of a gentleman—

Q. Too much of a what?

A. —a gentleman, to make such inquiries in such circumstances, and mean them. I expect it was more of a testing, or exploration, simply to find out what my reaction would be. The question was something to this effect: "Would you tell me, if I were to ask you, whether you are a member of the Communist Party?" My answer [fol. 250] was, "I would not tell you. And the reason I would not tell you, is [redacted]. If you were to accept my answer, whichever way it went, it would be on the basis of an appraisal you had made of the kind of person I am. If you already have that appraisal of the kind of person I am, the question you are asking is irrelevant for the position I want—for the position that I am being considered for. Therefore, I would not answer." He immediately dropped it, with an indication that he was not at all dissatisfied with my response. And I want to stress again, I don't think he meant the inquiry seriously, simply because it might be an unfair reflection upon his character if I suggested he did mean the inquiry seriously.

Q. But you feel that, whether you were or were not a communist—you feel that had no bearing on your fitness to teach?

A. I did not have to reach that problem. The fact was that he knew me, he knew people who knew me intimately, he had seen me around, he had been in classes I had been in, and it really was irrelevant.

Q. Were you to have been asked the question more formally, say on an application blank that the educational institution furnished you, would you have refused to answer the question?

A. Yes, now you are—your previous question and this, in a way pushes me—

Commissioner Sawyier: Just a minute, Mr. Anastaplo. You started— Will you read his answer back, Miss Reporter?

[The reporter read back the last answer, as requested:]

Commissioner Sawyier: I wanted to know whether the "Yes" was in answer to the question, or just an introduction.

Mr. Anastaplo: No. No, I—

By Commissioner Stephan:

Q. That was an aside, was it?

[fol. 251] A. Yes, I'm sorry. If it were on the questionnaire, I would not answer it. I mean, there have been a couple of teaching positions that I had practically offered to me, in fact had offered to me, which I did not take, because I had to answer that question—because I refused to answer such inquiries, both formally and informally.

By Commissioner Sawyier:

Q. Was that in the form of question, or in the form of an oath?

A. I have never seen it on an application form. Teaching positions at the university level usually don't involve application forms.

Q. The jobs that you did not consider because this question was inherent in the situation, was the question in the form of a question, as such, or was it in the form of an oath?

A. These were jobs which I did consider, and which I was interviewed for, and in the course of the discussion, this problem came up—not because anyone had any problems about the matter, but simply because they had heard about this case, and wanted to be prepared, should the Board of Trustees question them about it, that sort of thing. I simply said that I did not think it would be good for the institution involved, or for myself, or for the people I would be ostensibly serving.

By Commissioner Rothschild:

Q. How do you square that with your willingness to tell Mayor Daley what your position is if he were considering you as a judicial candidate?

A. Oh. If Mayor Daley were to call me in, consider me for a judicial position, we might have to sit down and talk about a lot of things, such as religious affiliations—

Q. That doesn't answer my question.

[fol. 252] A. It would simply be a matter of lining up the slate in a way appropriate for effective presentation to the public; that is what seems to me to be done with the way it is set up these days. And one might say a lot of things there he would not say ordinarily. It would be Mayor Daley as a fellow collaborator in a political enterprise, and maybe a number of things said would not be said elsewhere.

Q. I must have misunderstood you. I thought the thrust of your objection here was, that this is a state action compelling testimony, if you will, whereas in these other instances, and you cited Mayor Daley, it wasn't the question of state action.

A. That's right.

Q. And now you are citing these educational instances.

A. The educational instances would be cases where it would be based upon another consideration. That is, it seems to me from what I have heard of educational institutions throughout the country, that where institutions have imposed such restrictions and where teachers have acquiesced in restrictions, there is, or tends to be a vital intrusion upon academic freedom, which is harmful to the institution, the teachers, and the students, as well as the community at large. I would be inclined to resist such impositions by refusing to cooperate, myself. There would be no constitutional principle involved.

Q. You wouldn't make the over-all appraisal, would you, of a particular institution that you really are asking us to make, and decide that notwithstanding the asking of this question, that it might be a suitable place for you to be a teacher, notwithstanding the question?

A. I am sorry, I don't understand the question.

Commissioner Stephan: I didn't get that, either. Would you repeat it?

[fol. 253] By Commissioner Rothschild:

Q. If you had made an appraisal of a particular institution, and knew it intimately, and had decided that it was a fit place for you to teach, independently you may have come to this conclusion, and then you are faced with this question, I take it, from what you have just said, that the existence of this question would lead you not to become a member of the teaching staff of such an institution?

A. That is true.

Q. Notwithstanding your prior determination that it was a fit place for you—that question alone?

A. That is true. I would not want to seem, by my action, to encourage or acquiesce in such procedures. It is really, in a way, a very futile, a silly kind of gesture. At the same time, people have to make them. And I have been, in that respect, deprived of teaching positions in the best institutions in the country, on this very point.

By Commissioner Moses:

Q. Mr. Anastaplo, you went to Europe in recent years?

A. Yes, sir.

Q. You got a passport?

A. That is true, sir.

Q. In applying for the passport, at the time you got your passport, was there any question that dealt with communist affiliations?

A. No, there was not.

By Commissioner Sawyier:

Q. Were you, Mr. Anastaplo, in your position in the army, were you, to your knowledge, or would it be the ordinary routine, to have been investigated by the F.B.I.?

A. I frankly don't know. I went in the army, I think I [fol. 254] volunteered when I was seventeen, and it was during the war, and I really don't remember what the procedures were, what documents one signed, or anything else. I really was not concerned about that aspect of the matter. There was something else more pressing at the moment.

Q. You had a commission?

A. I got a commission, yes, after I finished my cadet training.

Q. You don't know whether it was common practice with the F.B.I. to give a report on officers?

A. Frankly, I don't know. I suspect, I mean, I would have to admit, that it would have very little bearing upon this committee's findings, inasmuch, as I say, I was seventeen then. Certainly it is very unlikely I was a member of the Communist Party before then. So far as I know, there wasn't even a Communist Party cell in Southern Illinois, where I grew up. And anything might have happened between seventeen and today. So even if the F.B.I. had investigated me and found me Simon pure, where are we?

By Commissioner Thomas:

Q. Have you applied for any renewal of your passport?

A. No, I haven't.

Q. On the present forms that are being used, I don't know how far back they go, but on the present forms that are being used by the United States, on those applications, there is a question, "Are you now a member of the Communist Party," and also a question, "Have you ever been, and if so, at what periods," and so on. If you were applying for a passport, would you be willing to answer the questions that now appear on that form?

A. Well, it would depend. It might depend on how badly I had to go abroad. If there was some great public service that had to be done abroad, and I was the one [fol. 255] commissioned to do it, I might have to reconsider my scruples in these matters. My recollection is that this provision was enacted, or promulgated by the State Department shortly after I returned from the recent trip. So it was not a problem I had to face. I am hoping, of course, that the Supreme Court, in its current decisions, will knock out this provision so that I would not be faced with the problem the next time I go abroad.

By Commissioner Stephan:

Q. You don't feel any similar pressure about getting admitted to the Bar of Illinois as you might about going abroad?

A. It is not as important to me, going abroad, as it is being admitted to the Bar of Illinois. I think it is far more important what I do here, than what I do for the State Department, answering the questionnaire. That is to say, what I do here with the Bar of Illinois, may be helpful to the Bar of Illinois. And my impression is that others are combatting, opposing the State Department provision, much better than I could do, and I am quite willing to permit an allocation of duties in this respect.

Commissioner Stephan: Do you have any further facts that you want to bring to the attention of this Committee about your character and fitness?

Mr. Anastaplo: Well, I have the possibility of facts. That is to say, I have a couple of suggestions to make.

Commissioner Stephan: Are these something you want us to do, or are you going to do something for us?

Mr. Anastaplo: I have no witnesses. I see no need for them. In addition, I am reluctant to call witnesses for other reasons.

Commissioner Stephan: You are what?

Mr. Anastaplo: Reluctant to call witnesses, which I will speak to later. I understand, however, that there is [fol. 256] currently, or just recently, an examination by this committee, and subcommittees thereof, of a contingent of bar applicants; is that correct?

Commissioner Stephan: There have been many applicants examined by this committee in recent weeks, yes.

Mr. Anastaplo: I mean, if I remember correctly, it would be once or twice a year when a flock of them went through.

Commissioner Stephan: Well, I think that is generally true, still. This just happens to be one of those times.

Mr. Anastaplo: Yes, and that is why I am referring to it. Could I have from the committee chairman, a statement, first, as to the duration of time usually allocated to each applicant; and secondly, the kinds of inquiries usually directed to such applicants? Let me add to this, this com-

ment. It is my understanding, from very random sampling, that the hearings now run about the same as when I went through, that is to say, about fifteen minutes—and that the hearings now are largely, with the possible exception of Commissioner Young, devoted to questions about the Canons of Ethics. Would you accept this as fairly accurate?

Commissioner Stephan: No, I would not. I will let the chairman speak for the committee in this regard, but I think you are putting words in our mouth.

Commissioner Thomas: Your impression is wrong in what you have on that and this is wholly without any features of complete response to your first question, because on that one, while it would be a matter for full committee action, my own inclination would be against any attempt to break down in detail to you, or to anyone else, the details of what goes on on the individual questioning. Those are confidential questions. An applicant has a right to [fol. 257] have a public hearing, as you know, under Rule 58.

Mr. Anastaplo: Yes, sir.

Commissioner Thomas: He also has a right to a private hearing. When he has a private hearing, we will not pass on to another applicant the contents of the private hearing, viously.

The time sequence depends upon the ordinary circumstances as against the extraordinary ones that develop. The ordinary circumstances are that the panel discussions vary, that is discussions between the applicant and the panel may vary anywhere from five minutes to a half hour to an hour, depending upon the circumstances that arise. Similarly, there may also be appearances on top of that, or in addition to that, by the applicant before the complete committee. All those are individual circumstances based on the individual cases.

Mr. Anastaplo: Yes. I hope I wasn't giving the impression that I was asking about particular applicants, or their own appearances. Offhand, I know no applicants before the committee at this time, or in the last year or so. Offhand, I mean. But what I was asking, was for the usual procedure, in terms of time and questions, and of course, the reason I am asking it is, that I think it has some bearing upon the due process of law.

Commissioner Thomas: I think I have answered your question as to usual time situation. As to the contents of the questions, that is a confidential matter.

Mr. Anastaplo: I see. Would the committee be willing, at my expense, to incorporate in this record, without any names, the transcripts of, say, the first three meetings of each subcommittee during the course of the current flock, and indicate whether this selection is unusual?

Commissioner Thomas: I think I just told you that the hearings, or the discussions on the candidates for appli- [fol. 258] cation are confidential, Mr. Anastaplo. That is a choice the individual man has a right to make, under the rule. He can ask for a public hearing, and get a public hearing if he does so. Or he can have his hearing confidential, and to himself. In that respect, and because of that, your request would be out of order and be denied.

Mr. Anastaplo: I see. Then perhaps—the answer you make to my request leads me to suspect that you don't understand it; or that I am not communicating the way I mean. I do not mean to include in these transcripts, anything that identifies any applicant. I would be willing to have removed from these transcripts—which I would take it would be sample, representative transcripts—any information that identified any particular applicant.

Commissioner Thomas: I think I understand what you want, and your request is denied. We cannot eliminate identity, nor would we, necessarily, even if we could, agree to such a procedure in your case. But even at best, you could not eliminate identity and the nature of the questions, and the nature of the right to confidential hearing is one which is provided for and is the right of the individual, himself.

Mr. Anastaplo: I see.

Commissioner Moses: Mr. Chairman, might we discuss this in executive session, in the absence of Mr. Anastaplo, a few moments?

Commissioner Thomas: Yes, indeed. Will you step out, please? Before you go out, though, are there any other questions of that nature that you would like to submit to us, because it might be more convenient, if you have two or three questions of that nature, rather than have you

step out each time on any particular question, perhaps the committee could consider them all at the same time.

Mr. Anastaplo: There is another one that may be taken [fol. 259] care of by what you said about the confidential aspects. I have, over the week-end, examined the record of the Latimer case. That is, I have examined so much of the record as Mr. Latimer's attorney sent to the Supreme Court of Illinois. It is not a complete record. There were eight or nine hundred pages in it, I understand, and there may be a couple of hundred in this record that I saw.

Commissioner Sawyier: By the record, do you mean the abstract? Is it printed?

Mr. Anastaplo: It was not printed, it was mimeographed. Abstract in two parts, mimeographed, running to about 172 pages, or so—176 pages. I should like to say more on the Latimer case, later. Mr. Latimer, in the course of these hearings—which I take it are public record now, since they were appealed to the Supreme Court of Illinois—

Commissioner Sawyier: He asked for a public hearing.

Mr. Anastaplo: He asked for a public hearing. In the course of these hearings, Mr. Latimer named, I don't know, fifty lawyers or so, as communists. Some of you may remember that episode, an episode that was provoked in part, I should say, by the committee's activities. Now, Mr. Latimer even named members of this committee, I understand—I haven't seen the list, and I am not particularly anxious to see it—and he named associates of members of this committee. And he was questioned about communist lawyers that he knew, or allegedly knew, communist lawyers that he knew. In addition, Mr. Latimer referred to another case which he had heard about, of a "Fifth Amendment communist" that was admitted by this committee. I do not care to bring his name up, since it hasn't been introduced by the committee heretofore. I will simply refer to him as Mr. K. Mr. K, Mr. Latimer tells us, and [fol. 260] the committee tells us in this record, was asked about communists he knew on the University of Chicago campus. My submission to you is, that first—I do not know what Mr. K said: I have not discussed this matter with Mr. K.—my submission to you is, on the basis of the silence I have heard so far during these committee hear-

ings which are about to close on this matter, my submission is to you, that Mr. K did not name me as a member of any cell he knew about on the University of Chicago campus. My guess is, Mr. K was asked about me, by name, and he did not name me as a member of any cell he knew about, I take it, as a communist, or former communist, on the University of Chicago campus. I would like to have a statement by this committee, then, one, to the effect—that is if these two statements are correct—one, that Mr. Latimer did not name me as one of the communists he knew about, although he produced, as I say, an exhaustive list, which included members of this committee—and that would suggest, of course, that his standards were rather loose as to who communists were. Two, I would like to have you submit, or agree, that Mr. K did not name me, either in any blanket statement, or, if it was the case, in a particular statement, with respect to the Communist Party.

I think both of these pieces of information, which came to the Court—I am sorry, to this committee, would be relevant to consider as part of the record of this committee.

Commissioner Moses: If Mr. Latimer was naming lawyers, he obviously wouldn't name you, would he?

Mr. Anastaplo: Mr. Latimer was rather careless about lawyers and non-lawyers. He named quite a number of people who were not lawyers, as well.

Commissioner Moses: Did he purport to cover the water front, as you understand it?

[fol. 261] Mr. Anastaplo: No, I have not seen the entire record. But it would be interesting to say that he did not name me, or that he was not asked about me.

Commissioner Young: Did you see the Latimer list, Mr. Anastaplo?

Mr. Anastaplo: I do not believe that I have seen it.

Commissioner Young: Under what circumstances?

Mr. Anastaplo: I said I do not believe I have seen it. It was mailed, I understand, to all lawyers. But I gather—what I say is, when I say that certain members of the committee were on it, is that I find references throughout the record to this, and I find committee members disqualified themselves right and left after Mr. Latimer named them, or their associates, and one thing or another.

Commissioner Young: Let me ask you this. Do you personally know who Mr. K is; what his actual name is?

Mr. Anastaplo: Yes, his name is actually mentioned in the transcript.

Commissioner Young: Is there any reason why you shouldn't give us his actual name here for our consideration for this executive session?

Mr. Anastaplo: Well, I didn't give it, first, because I thought you all knew the name and secondly, because it is very likely this transcript will go to the Supreme Court of Illinois and become, in a way, a public record, and I do not want to spread names around carelessly.

Commissioner Stephan: Some of us weren't on that committee.

Commissioner Sawyier: Well, I think we don't have to get Mr. Anastaplo to name him.

[fol. 262] Mr. Anastaplo: I imagine some members of this committee know who I am referring to—

Commissioner Stephan: I suppose they do.

Mr. Anastaplo: —and can inform other members. I have no scruples against telling you.

Commissioner Thomas: Well, I think we would have enough information for the basis of ruling on your inquiry.

Mr. Anastaplo: I am sorry. When I say I have no scruples—I do have scruples against telling you. But I would not push these scruples, ultimately.

Commissioner Thomas: Yes, I understand that. Are there any other inquiries that you want to make of us of the same nature that might be considered in the executive session we are referring to?

Mr. Anastaplo: Not offhand, of the same nature. I may have others, later.

Commissioner Stephan: Before you leave, could you give us some idea of what you intend to do from this point on? Do you have argument to make, or papers to submit; what is your program? We would like to be able to adjust ourselves to your needs.

Mr. Anastaplo: I have, first of all, a statement I would like to make on the use, by Mr. Young, with the concurrence or with the acquiescence of others, of the Rockafellow

case at the last meeting. And I should like, also, to make a closing argument at some length.

Commissioner Sawyier: Before we go into executive session, I would like to suggest that Mr. Anastaplo address himself to a matter which he said he would take up later. That is the non-production of any witnesses here.

Mr. Anastaplo: Yes. That I would take up in my closing statement.

[fol. 263] Commissioner Sawyier: Can you take it up now, before we go into executive session?

Mr. Anastaplo: Well, I would say, first of all, that I am reluctant even to bring any affidavits in, and I might not have brought them in if the committee rules did not require them, partly because I am really uninclined to drag other people into this case. Second, I believe now, at this stage, that the burden has been more than carried, so far as character and fitness, and that witnesses are unnecessary. Of course, that is my own opinion, which you can differ with. Third, I find there is something repugnant, in a way, to parading in a list of witnesses to testify to my character and fitness. I really find it in some ways very unbecoming.

Commissioner Moses: Do you mean from an esthetic point of view?

Mr. Anastaplo: In the Eighteenth Century they would have said, "it would be action unbecoming a gentleman."

Commissioner Stephan: I think that is a little quixotic.

Mr. Anastaplo: That is true.

Commissioner Stephan: You submitted affidavits from other people, and letters of recommendation.

Mr. Anastaplo: I say, I don't know whether I would have, except that the committee rules required it. Although, now that they are in, I am quite willing to take advantage of them.

Commissioner Young: Mr. Anastaplo, one of your real quarrels here is with the procedure of this committee. You don't agree with any of our methods of procedure.

Mr. Anastaplo: I wouldn't say "any" of them. I would say that they are in drastic need of reform, yes, sir. And I laid out a plan of reform in the letters I wrote to a mem-

[fol. 264] ber of the Supreme Court, in 1955, which you have in the record.

Commissioner Stephan: Well, are those the only two things you want us to consider?

Mr. Anastaplo: At this moment, yes, sir.

Commissioner Stephan: All right. We will excuse you, then, until we call you back.

[Mr. Anastaplo was excused. Following an executive session of the committee, Mr. Anastaplo was recalled.]

Commissioner Thomas: Mr. Anastaplo, we have considered your requests in the executive session, and with these results. The ruling that I made, that we would not supply you with copies of the transcripts of the inquiries to other candidates, is sustained and stands as the ruling. In that connection I will add for your information, and for the record, that the question as to whether an applicant is or has been a member of the Communist Party, or of various other organizations, including organizations listed as subversive on the Attorney General's list, has been and currently is, including this spring session, frequently asked of candidates. I can tell you that from my own information, having been a member of the committee for a good many years, participating both in panels, that is the initial meetings, with candidates, and also in the participation of the full committee. Now, on the—

Mr. Anastaplo: Before you go on, could I ask a question about that?

Commissioner Thomas: I will add on that, that that question has frequently been asked where there is no indication on the face of the questionnaire, and the answers thereto, or the affidavits, or of the discussions up to that point, as to the man's having been or even suspected of [fol. 265] being a member of various organizations of that nature.

Mr. Anastaplo: You mean you ask it, I take it, in most of these cases, out of the blue?

Commissioner Thomas: In many cases it is asked out of the blue. That doesn't exclude the possibility—

Mr. Anastaplo: —the possibility of it being asked for some reason, in other cases.

Commissioner Thomas: Yes, that's right. Now, on your second request, you made a request with respect to the Latimer hearing and with respect to hearing of an individual whom you identified for the record as Mr. K. That request is denied, and in that connection, though, I will tell you this. That no one has stated to this committee that you are or have ever been a communist or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the organizations, or any one of the organizations listed as subversive by the Attorney General's list.

Commissioner Moses: Mr. Chairman, that is a statement orally or in writing.

Commissioner Thomas: That is right. When I said "statement," it includes matters both oral or in writing, to the committee.

Now, then, do you have additional questions, Mr. Stephan?

Commissioner Stephan: Yes, sir.

Mr. Anastaplo: First, I should like to comment on part of this. You mentioned earlier, the right of the applicants to a secret hearing, upon which you are in part basing your first decision; is that correct?

Commissioner Thomas: I mentioned that as one factor. That isn't necessarily the basis on which the entire committee's ruling is made.

[fol. 266] Mr. Anastaplo: No. That is one factor taken seriously by the committee.

Commissioner Thomas: By some members of the committee.

Mr. Anastaplo: Yes. I would only like a comment in that connection. That is to say—

Commissioner Thomas: Pardon?

Mr. Anastaplo: I should like to make this comment in that connection, and that is that the committee thereby is—or some members thereof, are placing great emphasis upon the rights of applicants, as determined by the rules of the committee, which I grant is commendable, but at the same time, the same committee—

Commissioner Thomas: This is not a rule of the committee, Mr. Anastaplo. This is Rule 58 of the Supreme Court.

Mr. Anastaplo: For the secret hearings.

Commissioner Thomas: That's right.

Commissioner Weiss: The word is "private," Mr. Anastaplo. It reads, "The hearings before the Commissioners shall be private unless any applicant concerned shall request that they be public." That is in Rule 58.

Mr. Anastaplo: I take it, that is, "any applicant concerned" in the particular case, not in some other case.

Commissioner Weiss: Oh, yes, "applicant" is referring to the man—

Mr. Anastaplo: There is an ambiguity there, but I won't press that, obviously because I think it is as you interpret it. But still, it is a very curious situation. The rule of court creates a right which is honored by this committee, whereas the Constitution creates rights to keep information to one's self, which are not honored by this committee. [fol. 267] Commissioner Thomas: Well, now, Mr. Anastaplo, you can make, of course, in your argument to us, any argument you desire. What you are saying now sounds to me like one that could more appropriately come either in the closing argument, or in the brief.

Mr. Anastaplo: Yes.

Commissioner Stephan: I think it should be pointed out that another consideration that prompted us in making the decision that we did was that to take three random interviews and try to draw some conclusion from them is quite dangerous, whether they are pro or con your position.

Mr. Anastaplo: Yes, I realize that.

Commissioner Stephan: We weren't convinced that the whole thing had much probative strength.

Mr. Anastaplo: Yes. Then before I proceed with my statement about the Rockafellow case, I should like to refer to a few points that came up in the course of today's hearing.

Commissioner Thomas: Your statement about what case? I didn't hear you.

Mr. Anastaplo: The Rockafellow case, Mr. Young's case of last time.

Commissioner Thomas: Oh, yes.

Commissioner Stephan: Could I interrupt you Mr. Anastaplo, to tell you that we are going to adjourn at three forty-five, so that you have got about forty minutes.

Mr. Anastaplo: Yes, sir, thank you.

Commissioner Stephan: You will have another hearing, if one is indicated.

Mr. Anastaplo: Yes. Well, I just wanted to indicate certain things while my memory is still fresh on them. [fol. 268] In response to your comment about being quixotic, I would prefer to say that I am Eighteenth Century. And Eighteenth Century means the Constitution, and the founding fathers, which could be considered quixotic from the point of view under which you are operating.

In commenting upon Mr. Moses's reaction to the examples I used, I wasn't suggesting appropriate action for Jesus. I was only suggesting what action others might take in society who saw this particular man unjustly punished. And for that we have the example in Peter, who drew his sword. And in that connection, also, we have the advice of Aquinas, who talks about idolatry, which raises the same problem.

Now, may I also add, that I would not counsel a witness not to bring—I am sorry, counsel a client who has applied for admission to the bar, not to bring witnesses or submit affidavits. That is to say, this is my own preference, not what I would say to someone else.

Commissioner Stephan: It seems to me, Mr. Anastaplo, if there are people in existence who can aid this committee in reaching a fair and just determination of this issue, whatever your personal feelings are about the matter, perhaps they ought to give way to public interest that is involved in having us reach an honest and just decision.

Mr. Anastaplo: Yes. But I would say that if that is your concern, that you might not otherwise be able to reach an honest and just decision unless I should bring in witnesses, I have no doubt that you have access to information as to who the witnesses could be. I myself am not concerned about that problem right now. My own appraisal of the record is that the case has been more than established.

Commissioner Weiss: Is that the reason you are not [fol. 269] bringing in witnesses, Mr. Anastaplo?

Mr. Anastaplo: No, I was speaking to Mr. Stephan's point; that is to say, I don't think even that is a problem.

Commissioner Stephan: I would point out to you the possible unwisdom of being advocate and client and judge at the same time, as to the merits of your case.

Mr. Anastaplo: Sir, that has been brought home to me, time and again. I realize the risks I am running in that respect.

Finally, and once again, I should like to know whether the committee would now care to rule various questions about affiliations—I'm sorry—about religious beliefs out of order on the basis of this record, before I begin my analysis of the Rockafellow situation—or whether Mr. Young would care to withdraw his questions in that respect.

Commissioner Stephan: I don't think Mr. Young, or any single Commissioner, has the power to withdraw questions that are on the record. If any withdrawals take place, it would have to be by committee action.

Mr. Anastaplo: Do you mean that no Commissioner has the power to say—

Commissioner Stephan: No Commissioner has the power to change the record.

Mr. Anastaplo: No, I am not suggesting the record be changed. I mean, the record is rather interesting as it is. What I am suggesting is, that I have heard Commissioners approve of questions; it would seem to me it would be in order for Commissioners to disapprove of them, from time to time, when they have been shown to be without foundation. And that is what I am wondering about.

Commissioner Stephan: It has been pointed out before to you, that the mere fact that a question is asked does not [fol. 270] indicate that other people would have asked or approved that question, nor does it indicate that any particular weight will be attached to the answer or failure to answer the question; do you understand?

Mr. Anastaplo: I will have to speak to that problem. It is a very serious problem, procedurally, and under the rules of the court.

Commissioner Stephan: In the nature of the case because of the nature of the subject matter and the type of hearings we conduct, a great deal of latitude is given both in the manner of questioning, the type of question asked, and in the type of response permitted. I don't think

you could feel that you have suffered from the lack of latitude.

Mr. Anastaplo: I'm sorry. I submit, then, that if this is inherent in the committee's procedures, then the procedures of the committee are inherently unfair and I will try to show what I mean.

Commissioner Stephan: Will you wait just a moment, please?

[There was discussion, off the record.]

Commissioner Stephan: May I ask you this, Mr. Anastaplo? Are you now at the point of argument, and are you through presenting facts to the committee for its consideration?

Mr. Anastaplo: I am not sure, sir. It will depend on what happens, the reaction to my treatment of the Rockafellow case. If I may defer that decision.

[There was discussion, off the record.]

Commissioner Stephan: The hearing will resume. You go ahead with whatever point you wish to make at this time.

Mr. Anastaplo: Yes, sir. Let me start by saying I believe the seriousness of these matters obliges me to speak bluntly and unequivocally, so there will be no misunderstanding.

[fol. 271] Commissioner Thomas: Can you keep your voice up a little? It is somewhat difficult to hear you.

Mr. Anastaplo: Although I am speaking of a particular action, that is, Commissioner Young's action and questions, the last period, these actions were taken with what I take to be the chairman's acquiescence or permissiveness, and with Commissioner Moses's explicit approval. And I believe these actions are representative of the approach of the committee as a whole. Consequently, I think they are very illuminating.

Let me also add in this connection, that irresponsible questions can lead to consequences that no further correction of the record—no later correction of the record, or no later decision of the committee, can correct. And I give you as one instance of that—one instance of that is, once again, Commissioner Young's question in the Latimer case.

where he asked Mr. Latimer to produce a list of the members of the Communist Party that were lawyers, that he knew of, and when Mr. Latimer took this at face value, in his own peculiar way, and proceeded to bring in this list of fifty communists or so, he was thereupon penalized severely for having done so, penalized both before this committee and in the eyes of the bar, and in the eyes of the Supreme Court of Illinois, irrespective of whether or not his list was accurate. That is to say, I believe—

Commissioner Thomas: Mr. Anastaplo, may I interrupt you there, to say that your statements there, and our failure to contradict them orally at this time, by no means represents acquiescence on our part as to the truthfulness of what you are saying.

Mr. Anastaplo: No. I am only basing what I say about [fol. 272] the Latimer case on the record—on the parts of the record that I have read.

Commissioner Stephan: Well let's get back to this case. I think we can go far afield in Latimer.

Mr. Anastaplo: No, the reason I point to that is, that it is not simply a chance occurrence here. My contention is that this sort of thing almost inevitably happens when a controversial matter is being discussed.

Commissioner Sawyier: You mean, Mr. Anastaplo, under the procedures of the commission, of the committee?

Mr. Anastaplo: Yes, sir, under the procedures of this committee. Now, I don't think the incident I am referring to—the one last time—is taken care of in any way by a belated reference to a later case several weeks later, because prejudicial things can happen at the time, and prejudicial things can happen in the interval.

Commissioner Stephan: What are you suggesting be done?

Mr. Anastaplo: Pardon me?

Commissioner Stephan: What are you suggesting be done? If this can't be erased, what are you suggesting be done?

Mr. Anastaplo: I will give you a suggestion about that. The primary one is that the rules of this committee should be changed. I think that is the basis of that problem.

Commissioner Rothschild: We are not going to decide that in this case.

Mr. Anastaplo: This case may contribute to the appreciation of the fact that these rules should be changed.

Commissioner Stephan: Well, that is quite possible, but let's get on with your point.

Mr. Anastaplo: Yes. Commissioner Young expressed at page 144 of the transcript, his apprehension that lawyers [fol. 273] might not deal fairly with him as an opponent in the courts. He had to know, he had to be sure. And it was for this reason he asks about communism of every applicant who appears before him. Of course he professes not to be content to rely on an applicant's fear of inner sanctions, or on a sense of honor, or on his conscience's guide. No, as we have seen at pages 144 to 146 and pages 205 to 217 of the transcript, the crucial thing is that a belief in God, with divine rewards and punishments, either in this world or the next, must also exist in the mind of the applicant before his testimony here, or his attorney's oath, would be acceptable to Commissioner Young.

Commissioner Thomas: Mr. Anastaplo, I notice you are reading there from a prepared document. Is that one in the form which you would care to submit it to be copied into the record, and copies to be read by the members here, or do you intend to read through those several pages here, now?

Mr. Anastaplo: I should prefer to read through them, for various reasons. One is—

Commissioner Thomas: How many pages are there?

Mr. Anastaplo: There must be at least a dozen.

Commissioner Stephan: Are they all on this point?

Mr. Anastaplo: Yes, sir. One reason I would like to read through it is, I am making corrections as I go. It is a rough copy. Secondly, I would like to make comments in the light of what has happened already, today. Thirdly, I prefer to be as fair as possible, to do this in the presence of the people that I am talking about. I very much dislike to do these things at a distance.

Now, of course, there is a problem of how one is to be tested for that belief. Still, that is what he relies on. Pre- [fol. 274] sumably he thinks that a communist would not have such a belief in God, and so forth. Yet, he has all applicants sworn and thereupon asks them questions and

relies upon their answers. He asks them whether they are Communist Party members with the intention of eliminating those who are. I leave to others to try to construct the dubious reasoning necessary to support this approach as effective.

The observations I have just made are related to the analysis I made at our last meeting of the significance of my refusal to answer several questions, where I spoke of the logical implications of my refusal. Now, I do not want to say any more now, about the effectiveness of Commissioner Young's communist-catching approach.

I do want to discuss the importation into this case of old religious controversies, an importation carried on with the active acquiescence of the chairman, the passive acquiescence of the committee, and the express approval of Commissioner Moses.

This development illuminates several aspects of this matter. One aspect relates to the fairness and good faith of this committee. The evidence to which I testified in our first session of February 28th, the evidence that an Illinois Supreme Court justice revealed to me, that "no one ever thought you were a communist," said something about the fairness and good faith of the present committee in putting to me, on this record, and despite the Supreme Court Order of September 17, 1957, inquiries about possible communist affiliations. These inquiries were primarily put, it must seem on this record, perhaps for the purpose of getting me to refuse to answer them.

I was asked last meeting, my feelings about the fairness of this committee. I should now like to say something about this, and to illustrate what I mean by saying a few words about Commissioner Young's inquiries about relig- [fol. 275] ion, which took up one-fourth of my last meeting with you. What I have to say also has a bearing on how the freedom of speech provision in the Federal Constitution should be interpreted by Illinois, inasmuch as religious provisions in both the Federal and State Constitutions are no more extensive than the freedom of speech provision.

Commissioner Thomas: Mr. Anastaplo, may I interrupt you?

Mr. Anastaplo: Certainly.

Commissioner Thomas: Does your consideration of this problem, or question, that you have been discussing, does that mean that if the record stands as it is, that you will have additional factual material to lay before the committee, or to bring before us, to present to us for our consideration in connection with the questions and answers that have already been asked, or are you merely making an argument about the relevance and materiality of those particular questions and answers?

Mr. Anastaplo: Frankly, I do not know. It would depend partly on what the response is to the motions I will make.

Commissioner Thomas: Well, continue then.

Commissioner Stephan: Are you going to make the motions at some points soon—

Mr. Anastaplo: No, sir, not soon.

Commissioner Stephan: —so that we can understand just exactly what you are arguing about?

Mr. Anastaplo: I am arguing about these questions and the—

Commissioner Stephan: You are objecting to the questions having been asked?

Mr. Anastaplo: And also, I am asking for certain action on the part of the committee, in the light of these questions. [fol. 276] Commissioner Thomas: Can you tell us what the action of the committee is that you are asking for, before you go further?

Mr. Anastaplo: I am asking for certain rulings about the legitimacy of these questions, and I am asking for a favorable ruling about my refusal to answer the questions. I am not asking they be struck from the record.

Commissioner Thomas: Your refusal to answer the particular questions that Commissioner Young addressed to you, is that what you mean?

Mr. Anastaplo: Yes, sir.

Commissioner Thomas: I see.

Mr. Anastaplo: Let me say first of all, I simply cannot see how the committee can operate fairly the way it is proceeding. I take it, as you have indicated already, that the committee permits any Commissioner to ask any questions he pleases. No attempt has been made, in my experience, to police the questions. So far as I know, the

committee implicitly adopts all questions, never disavows any, and certainly never, whether or not at the request of an applicant, rules any question out of order. Rather, the applicant is forced to decide for himself what is a serious question and what a foolish one, what comes from an informed and responsible man, and what comes from an uninformed or irresponsible man. In short, the committee sinks to the lowest level to which any member chooses to take it.

[fol. 277] Commissioner Thomas: Mr. Anastaplo, are you familiar with the practice in courts when evidence is offered in court without a jury, as to the matter of receipt of evidence, subject to further consideration by the court?

Mr. Anastaplo: I take it that is what you are suggesting might be the procedure here.

Commissioner Thomas: I just wondered if you are familiar with that customary practice.

Mr. Anastaplo: Yes. I have heard of that, yes, sir.

Commissioner Thomas: We would like you to bear that in mind.

Mr. Anastaplo: I do have something with respect to that. Now, it is left to the applicant to decide, not only whether the inquiry is proper, relevant and constitutional, but it is also left to him to assume the prejudicial burden of resisting even clearly improper inquiries. For it is prejudicial not only in his relation to the particular committee member involved, but also in his relation to the committee as a whole for an applicant to presume to match his judgment against that of the character commissioners. The conflict that this brings about is itself prejudicial. But I have yet to hear a single inquiry, no matter how improper, ruled out of order, nor have I once heard of an applicant being commended for his resistance to an improper inquiry; nor have I heard of any applicant being spoken of in a report to the Supreme Court of Illinois, to the effect that, "We asked him some improper questions and he, God bless him, refused to answer them." Instead, I have heard such inquiries as Commissioner Young's endorsed by another committee member, and when I protested vigorously to the chairman, I was advised that I should not be so concerned.

Commissioner Stephan: Would you cite the record?

Mr. Anastaplo: Yes, sir. In the first instance, at 216, [fol. 278] and in the second one, 211. I am paraphrasing your reaction to it, sir.

Even after I reminded the chairman, page 214, of what none of you should have forgotten—that the next step in these inquiries about religious beliefs, about my views of a Deity, would be inquiries about the kind of Deity one believes in; even after this reminder of the old anti-Catholic and anti-Jewish test oaths, and the declarations about transubstantiation— I was left to stand alone against improper inquiries, and to suffer the consequences of that stand. Indeed, the handling of this matter by the committee, a matter gravely affecting my livelihood and reputation, has been cavalier, irresponsible and careless, and consequently, unfair under the Fourteenth Amendment.

It is, if I may say so, almost as if we are playing games, rather than dealing with very serious matters.

I have, since our last meeting, read the Latimer case, 11 Ill. 2d, 327, which someone referred to me. I grant you that the various activities engaged in by Mr. Latimer and described by the Court in its opinion, are dubious, and create problems for bar admission purposes. But what I should like to know before passing judgment on such a man, what the opinion of the Court does not reach, is what this committee contributed to Mr. Latimer's conduct. For all I know, he may have been provoked to the limits of his patience by the tactics of this committee.

Commissioner Stephan: I think I am going to have to rule that we are not going into the Latimer case, or whether this committee acted properly or improperly, and we won't hear anything further on that point. The case is over with. We are quite willing to listen to the merits of this case, but not the Latimer case.

Mr. Anastaplo: O. K. As evidence in support of the con- [fol. 279] jectures I have been making about irresponsibility of the committee members, I call your attention to the irrational, unfair and erratic tactics engaged in by some members of this committee, and adopted by the committee as a whole, during my own appearances before you. These tactics, a sample of which I now propose to lay before you,

have been indulged in by men who are under no danger to their careers, livelihoods, or reputations. There is no reason to believe they would act better under pressure. I am suggesting, therefore, that when such pressures are put up with in a case, such as mine, you are really being unfair to an applicant to subject him to them, simply because of the reactions that might follow.

Commissioner Weiss: Pardon me, Mr. Anastaplo, you say, "adopted by the committee as a whole." I mean, there weren't any sessions where we adopted any particular question or any answer, while you were here, were there?

Mr. Anastaplo: Sir, these are adopted in the sense that they have been acquiesced in in the committee for a long time, so far as I know, this practice of permitting people to ask any question that they decide to ask. That in a sense, to me is a much more vivid instance of adoption than putting something on paper.

Commissioner Weiss: This is not like a jury case, where you can't sit back and read the record and evaluate certain questions and certain conclusions.

Mr. Anastaplo: That's right. The problem is, what happens when you ask an improper question and conflict thereby emerges which cannot be corrected late, or reflected upon. I will show how this actually happened in my case, in the closing arguments.

Commissioner Sawyier: Mr. Anastaplo, I don't see, then, how you can legitimately use the word, "acquiesce." They cannot be corrected from your point of view, perhaps, nor can they be corrected from the point of view of any individual member of the committee—in the same sense.

[fol. 280] Mr. Anastaplo: Well, I will speak to the problem of acquiescense later.

Commissioner Stephan: In any event, you did not answer the improper question, if viewed as improper by you; is that correct?

Mr. Anastaplo: Yes, that is the point. I can refuse to answer any question.

Commissioner Weiss: Well, my only point, Mr. Anastaplo, in interrupting you, and I apologize for it, is that you have yourself been asked at the beginning of each session whether in the past session there was anything that should

be corrected, expanded, modified, and so forth, realizing that you don't get a chance to really think in perspective at any given session.

Mr. Anastaplo: On the contrary, sir, I was told I should wait until the end to do that.

Commissioner Weiss: Well, but it is still a continuing proceeding. Merely because we stop at four o'clock, after four or five hours, doesn't mean that it isn't a continuing proceeding. The opportunity is what I am talking about, to make all corrections, is still inherent in this proceeding.

Mr. Anastaplo: I make this complaint. Even if the question is clearly improper, and even if you all agreed later it was clearly improper, it would have been prejudicial to me to refuse to answer. If a man is asked about God and he refuses to say anything about Him, it is prejudicial.

Commissioner Weiss: I wasn't arguing to the particular point you were talking about. I am talking about the general over-all procedure being informal, not necessarily one as would be existent in a criminal court, probably, with a jury present.

Commissioner Christianson: Mr. Chairman, I would like [fol. 281] to suggest this gentleman be permitted to make his remarks in sequence and in order, without interruption; that if we have anything to ask, we can ask it later. I find it difficult to follow as long as he is being interrupted all the time.

Commissioner Stephan: Proceed, Mr. Anastaplo.

Mr. Anastaplo: Inquiries into my religious beliefs first arose April 7, page 144. I thought at that time, my reference to the well-known history of Anglo-American law in this field of oaths of office, and competency of witnesses, should be sufficient to satisfy Mr. Young and any member of the committee who was interested in the problem. Perhaps even the committee as a whole was caught by surprise, as I was, by his inquiries about religious beliefs. I do not know whether Commissioner Young had warned you beforehand that he would make the inquiries he did. I do not see, however, why the committee should not take responsibility for any line of inquiry that it does not immediately repudiate and cut off. I have yet to see a distinction that makes sense, between formal questioning and questions of a miscellane-

ous nature from members of the committee. I am referring here to page 212, where the chairman seems to make that distinction. So far as an applicant can tell, all lines of inquiry have equal status.

At the following meeting, that of April 23rd, the same religious inquiries were permitted, over my strong protest, and without objection of the committee. Once again I was left to run the risk, and incur the prejudice of resisting questions about whether I believe in God and in divine rewards and punishment. But if I may remind you, Commissioner Young was supported at the last meeting, not only by certain members of the committee but also by Volume 17 of the Illinois Reports from which he read us a passage. The passage, if I may further remind you, is [fol. 282] found at page 554 of Volume 17, which I should like to read.

> "But one having no religion, believing in no God, and not accountable to any punishment for falsehood here, or hereafter, except his own notions of honor, veracity and amenability to criminal justice, cannot be sworn, as no legal, moral, conscientious obligation or responsibility, in the view of the law, can be imposed by an oath, and he may not testify without."

It was, as I observed at page 210, obvious to me, as it should have been to a committee alert to its responsibilities, that this was rather outdated doctrine. One has only to recall the outstanding Chicago lawyer, Clarence Darrow, in his public speeches about God and religion, to know that for better or worse, times have changed with respect to this issue.

I asked the date of that case, *Central Military Track Railroad Company* v. *Rockafellow*. It was, Mr. Young replied, 1856, but he hastened to add, "I don't find that it has been overruled or modified since then." All this is to be found at page 210 of the transcript. At the bottom of page 215 is what I take to be the chairman's implicit endorsement of the question, nullifying, in effect, his earlier claim, also on that page. "One thing that I think is perfectly clear," he had claimed, "and I hope it is to you, and that is that

this committee is not exacting a religious qualification for the office of attorney in this state."

I am afraid that there is some confusion here about what a religious qualification is. There is, we used to say back home, "more than one way to skin a cat."

The chairman's dangerous ambiguity and permissiveness with respect to these inquiries, was matched by Commissioner Moses's unequivocal statement, based in part on a dubious interpretation of the philosophy of the Summers case, as he put it, at pages 215 and 216. "I am giving you," he says, "my own view that a man who takes an oath without a belief in the Deity, is going through an empty form; [fol. 283] he is not in good faith taking an oath; and I also say that one who would do that, in my judgment, would be unfit to be a member of the bar. And I say further, that if it is more important to him not to reveal his views on that subject, because in his opinion the First Amendment plus the Fourteenth keeps him from having to do so, that bears, in my opinion, only, as a Commissioner, upon his fitness, and I want to give you that information at this time so that you can't feel that I withheld it from you."

May I add, for the benefit of the stenographer, that I will give her afterwards, copies of these various excerpts.

Commissioner Moses: You don't object to my frankness with you?

Mr. Anastaplo: No, sir, I do not object to frankness. I appreciate it. I question the validity of what you say, of course.

My protest that the 1856 Rockafellow doctrine had long since become dead law, fell on deaf ears, even though I pointed out, quote, "I think even the most elementary knowledge of Anglo-American law would furnish us with a very clear indication that that simply is not the rule of today." (Page 210) Even after I pointed that out, the honorable Commissioner was permitted to press his inquiry.

I should have thought a character committee would not only make it a point to be aware of fundamental constitutional developments, but would be particularly scrupulous about novel inquiries into political or religious beliefs. But as you know, I have serious reservations about the

commitment of this committee, to the rule of law, and to the integrity of the judicial process. I am speaking of you, not as lawyers, but as members of this committee. The procedures and standards—

Commissioner Stephan: A rather fine distinction.

[fol. 284] Mr. Anastaplo: My suspicion is that in a court of law you are all honorable men, and that you would not permit yourselves to do, or permit your opponents to do the things that you permit yourselves or your fellow members to do to helpless applicants. The procedures and standards you employ make it hard for you, as a committee, to behave the way you expect others to behave towards you in other judicial proceedings. You permit yourselves too much power and divest yourselves of too much responsibility. Almost inevitably you become unfair in both the common sense and the constitutional sense, when you encounter conscientious opposition. I submit to you again, a thoroughgoing reform of committee methods and standards is necessary, a reform that curbs many of the radical things that you have been doing. You should consider carefully, I further suggest, the recommendations for reform I made in my two 1955 letters to a member of the State Supreme Court. I have had an opportunity to think about these problems with a degree of care that you, as busy men, are not able to devote to them. I have had that opportunity and the incentive, I should add. I urge you, as I did the Supreme Court Justice, to regard the study of these suggestions, quote, "as those of one who has no other interest than that of making a contribution toward the improvement of the administration of justice in the State of Illinois."

Of course, you might all later decide not to say anything about these religious inquiries in your report to the Supreme Court. You might wash them out of your decision. There is precedent for such selectivity in the 1954 report of this committee to the Court, in which unanswered questions about membership in the Ku Klux Klan, and in fact about all organizations I might belong to, and about subscriptions to the Daily Worker and the Chicago Tribune were completely ignored by the committee in its report to [fol. 285] the Court. This, of course, resulted only in a distortion of the issues and of the nature of our contro-

versy, just as there would be a distortion now if one does not remember my refusal before you to answer questions about membership in the Ku Klux Klan, the Silver Shirts of America, the Republican Party, and the Democratic Party, as well as questions about God and the hereafter, all of which questions I have been asked and have refused to answer.

In any event, until the committee report, and even after, I suspect, I am to be prejudiced by my refusal to disclose my religious opinions. Besides—and this points to the unfairness of these methods—besides, you have no way of knowing what damaging and highly prejudicial answers might result from such inquiry, especially if an applicant took at face value, as the committee did, the commissioner's authorities. An agnostic or an atheist, for instance, might have decided that his career was lost unless he lied about his lack of religious beliefs; or he might have decided to speak truthfully, and have been driven to defend his agnostic views by questioning the validity of the religious faiths which he did not accept. It would not take much imagination to construct what he might have said in justification for his lack of faith. Thus, he might have claimed that his agnostic belief made him better qualified to serve as an attorney in a modern, liberal society than would a commitment to, say, the Roman Catholic faith, which in his view, bound a man to a form of totalitarian power, exercising a much stronger and more despotic control over the bodies and souls of men than even Russian communism has been able to secure. This is the sort of argument that a desperate agnostic, anxious to prove he was much more independent and reliable than devout believers, might be driven to by religious inquiries. The only course of action that would have been safe, at that time, simply would have been refusal on principle to [fol. 286] answer the question. But such refusals on principle are frowned upon by this committee. All of this, of course, would be highly prejudicial to him, even if it were later granted that agnosticism was compatible with membership in the bar.

Gentlemen, you are all, I believe, older than I am. You know the ways of the world, you know how people get excited about religious and political ideas. Do you not see

that every time you permit inquiries into those areas, you are least likely to be able to make a fair judgment of character and fitness? The applicant says the wrong thing, the commissioner gets excited, and in a few minutes ancient armies are resurrected and mounted against one another, and it is the applicant who must pay the price of such excursions, especially if he is honest in what he says to you. I will say more about this very serious problem in my closing argument, when I discuss the opening pages of my first encounter with this committee.

It is incredible to me that an 1856 case on a religious issue should have been taken so seriously by the Commissioners and by this committee.

Commissioner Stephan: Excuse me. We have three or four minutes. Would this be a logical place to stop, or can you wind up on this Rockafellow point in that time?

Mr. Anastaplo: No, I cannot wind up.

Commissioner Stephan: So it is a logical break isn't it, to close this hearing on, today?

Commissioner Moses: Mr. Anastaplo, when you come back I would like to have you discuss whether it is unreasonable to expect a man who does not believe in a Deity to take advantage of his right to affirm, as distinguished from his taking an oath. The statute gives a man who becomes a lawyer the right to affirm that he will support the [fol. 287] Constitution if he has any reason for not wishing to swear that he will support the Constitution. That I would like to hear you deal with, if you feel that it has any substance. Certainly it was in my thinking when I said what I did, with respect to a man who elected to take an oath.

Mr. Anastaplo: I see. You would say that everything you said about it, pages 215, 216, really didn't apply to every applicant, but only to those applicants who take an oath?

Commissioner Moses: I say, a man who takes an oath without any belief in a Deity is going through a mere form, in my opinion, and that the proper thing for him to do is to affirm.

Mr. Anastaplo: I see. Then the problem of the Rockafellow case lives on, and I will have to speak about it in further detail.

Commissioner Stephan: Let's see if we can set the time for the next hearing.

Commissioner Rothschild: Mr. Chairman, I would like to make one suggestion. I followed Mr. Christianson's suggestion in the matter, and did not interrupt. As far as I am concerned, sitting here, I have a very practical problem. I have to decide how to vote on your application. I am not particularly interested in being scolded about what the committee did, or being told how the committee should reform its views, reform its procedure. If there is something that has happened to you that you think is unfair, and that you want particular action taken in your case, that I am interested in. But I am really not interested, in this proceeding, which is long enough already, and promises to be longer, in hearing what you think the committee ought to do in its future cases. As far as I am concerned, this is the first time when you get into the area of prejudice with me. I am just not interested. I have a case to decide. I would [fol. 288] like to hear you address yourself to what you want us to do. Mr. Young has sinned against you, you think. All right, how do we correct that. I don't want you to answer that, but that is the kind of thing I am interested in. The committee has done something wrong; what is it that you are asking the committee to do. The rest of it, really, as far as I am concerned, is extraneous and I think quite offensive.

Mr. Anastaplo: I see. It is offensive in the sense that the truth hurts. In what sense is it offensive, sir? Is it offensive to point out to the committee one very striking example of how its procedures in this case have been unfair, and how they can almost inevitably be depended on to be unfair?

Commissioner Rothschild: I am interested in anything you have to say to this committee with respect to the disposition of your application, period.

Mr. Anastaplo: Yes, sir.

Commissioner Rothschild: And I think you have had difficulty in having an opportunity to give your views at certain points along the way. I am going to sit here as long as you want to talk, whether it is six, eight or ten sessions, but I say to you, as far as I am concerned, I am interested

in things having to do with your application, your character and fitness, and I am not interested in your views on the committee's proceedings. I may be alone.

Commissioner Christianson: You are not alone.

Commissioner Rothschild: We want you to have ample opportunity to be heard, but on the issue. The issue is your character and fitness.

Mr. Anastaplo: And the issue, further, is, what does the evidence in this committee mean in the light of the committee's practices and procedures.

[fol. 289] Commissioner Stephan: All right. We are going to set an adjourned date now.

Commissioner Thomas: May I make this comment, Mr. Anastaplo? You will have the opportunity to submit to us a brief, in typewritten, or whatever is legible form, not an expensive type of procedure, that feature, and as long a brief as you desire, no limitations on the length of the brief, arguing any points about your application that you desire. Please bear that in mind, won't you, in connection with your oral discussions here to us, because we have, as you know, a large number of lawyers here who have been sitting upon your case and considering it very seriously. We have gone through several long sessions—this is not a complaint at all, but it is only for your consideration here. We want to give you every opportunity to present to us everything for our consideration that you want to. I can assure you that whatever you present to us in writing will be read and will be considered by the committee. Bear that in mind in holding down to a minimum the amount of the argumentation feature that you present to us orally, because otherwise it becomes an imposition, frankly, upon the large numbers of lawyers who are very much interested, of course, in your case, here, as Commissioners, and who want to give you every consideration possible.

Mr. Anastaplo: I am very sincere when I say I prefer to make oral argument. The thing is, I am not at all reluctant to be questioned on any point I am making. I hold myself open to interruptions and to comments that I can meet, and of course, to discussion. I really am obliged in this matter to speak about the committee procedures as

a whole, partly because the committee did justify its decision last time by defending the committee procedures, and that is a critical issue, how, in the context of committee procedures, this case can be seen. If the framework itself [fol. 290] is questionable, as indicated by what has happened in this case, the framework itself has to be looked at carefully.

Commissioner Thomas: Well, Mr. Anastaplo, in so far as your comments and your speaking, it is a matter of your views and comments and argumentation about the record as you find it, to me, much of your present statement has sounded, that you have read, do that in so far as possible, please, in connection with your final brief, and then if the committee, after reading your final brief, want to ask you questions about the final brief, then we will call you in for further questions in connection with things that you may say in your final brief.

You will also have an opportunity for closing argument. But if you will talk with some of your friends who are lawyers, you will find that much in the way of argumentation is more appropriately expressed in the form of a brief and then upon that brief in not necessarily any extended—you can condense a great deal, in oral argument there, on the basis of the kind of brief you submit. Just bear that in mind. I am not attempting to limit you in any way at this time. Perhaps, I hope not, it may become necessary in the future, as far as limitation on time is concerned. But bear that in mind in connection with material and the manner in which you present the material you want us to consider.

Mr. Anastaplo: May I suggest to you that you all read, in the interval, between now and next meeting, two things. One is, the Rockafellow case. Assume that nobody had overruled it, and still look at it and see what it means to you. Secondly, I would like to have you read, or glance through the record in the Konigsberg case, which I should like to leave with the chairman, which I have taken out from a local library and which, if you gentlemen would care to examine it, I should like to leave with you. I will be making refer- [fol. 291] ences to it.

Commissioner Stephan: Thank you, I would like very much to see it. I am sure the others would, too.

We usually allow what—ten days to two weeks between hearings, Mr. Secretary?

Mr. Anastaplo: Mr. Chairman, may I interrupt? I am willing to come back tomorrow, or any time thereafter, since I don't necessarily need the transcript.

Commissioner Stephan: What you have to do is not dependent on the record?

Mr. Anastaplo: The record I already have. The record I am speaking of, is the record I already have.

Commissioner Moses: We are in the argument stage.

Mr. Anastaplo: The arguments are prepared, more or less, in rough form.

Commissioner Stephan: How would next Monday suit you?

Mr. Anastaplo: The date of that is what?

Commissioner Stephan: The twenty-sixth.

Mr. Anastaplo: That will be all right.

Commissioner Stephan: Shall we do it at one o'clock, on the twenty-sixth.

Commissioner Weiss: Mr. Chairman, the record shows there is a continuing offer here to Mr. Anastaplo to have counsel, if he so desires—

Commissioner Stephan: Correct.

Commissioner Weiss: —and such witnesses he may think necessary, to help his case?

Commissioner Stephan: Absolutely.

The meeting is adjourned.

[The hearing recessed at three fifty-five o'clock.]

[fol. 292]

BEFORE THE COMMITTEE ON CHARACTER AND FITNESS

FIRST APPELLATE COURT DISTRICT OF ILLINOIS

SITTING AS COMMISSIONERS OF THE
SUPREME COURT OF ILLINOIS

In re: GEORGE ANASTAPLO (Session VI)

Proceedings: May 26, 1958

Reported by: Elsie W. Bingham

Present:

Commissioners James P. Carey, Jr., J. R. Christianson, Richmond M. Corbett, James E. Hastings, Walter H. Moses, Edward I. Rothschild, Calvin P. Sawyier, Edmund A. Stephan, D. Robert Thomas, Jerome S. Weiss, Horace A. Young.

*****

Richard H. Cain, Secretary.

*****

COLLOQUY

Commissioner Stephan: The hearing will please come to order. Mr. Anastaplo, I have been instructed by the Committee to advise you that all matters pertaining to your religious beliefs, or your lack of any religious belief, and your failure to respond to questions directed to that subject matter, will be entirely disregarded by the Committee in arriving at its determination as to your character and fitness. Is it clear to you what I am endeavoring to tell you?

Mr. Anastaplo: Could you have that read again, please?

Commissioner Stephan: Would you read it back, Miss Secretary?

[The reporter read the statement of Commissioner
[fol. 293] Stephan, as follows:

"Mr. Anastaplo, I have been instructed by the Committee to advise you that all matters pertaining to your religious beliefs, or your lack of any religious

belief, and your failure to respond to questions directed to that subject matter, will be entirely disregarded by the Committee in arriving at its determination as to your character and fitness."]

Mr. Anastaplo: May I reserve the right after reflection upon this, to decide what statement, if any, I should make about the Rockafellow case?

Commissioner Stephan: You may.

Mr. Anastaplo: And its use by the Committee.

Commissioner Stephan: Now, before you start in, I would like to reach some understanding with you as to the amount of time that you think you will need.

Mr. Anastaplo: May I ask one question?

Commissioner Stephan: We all have to plan our day and the days ahead.

Mr. Anastaplo: If you permit me to ask one question, I think I can sum it up.

Commissioner Stephan: Yes, sir.

Mr. Anastaplo: How much time do you expect to spend today, here?

Commissioner Stephan: I thought today we would spend no more than two hours. I would be hopeful that you could wind up the oral presentation in that time and then, of course, you will have time to file a brief.

Mr. Anastaplo: Then if you will permit me to proceed in an orderly fashion, I think I can today make all the presentation I plan without requiring any further meetings of the Committee.

[fol. 294] Commissioner Stephan: That will be helpful all around.

Mr. Anastaplo: May I have five minutes just simply to recast my opening remarks, in the light of your—

Commissioner Stephan: Yes.

Mr. Anastaplo: I don't have to go out.

Commissioner Stephan: Why don't you, because there are a couple of questions—

Mr. Anastaplo: Oh, you wish to—

Commissioner Stephan: Well, we might, and—

Mr. Anastaplo: All right.

Commissioner Stephan: We will be in touch with you in five or six minutes.

[A recess was had.]

Commissioner Stephan: The hearing will come to order.

Mr. Anastaplo: Would you care to indicate, Mr. Chairman, the basis for the exclusion of these questions, or would you rather reserve—

Commissioner Stephan: I think I would not wish to do so. I am not sure that since the matters are out of the record and will not be considered by us, that the various reasons that support our conclusions are particularly relevant.

Mr. Anastaplo: Out of the record? You are not suggesting that they are out of the transcript?

Commissioner Stephan: No, they are out of our consideration.

Now I take it that what you are going to do from this point forward is argue your position, and that the proofs are closed. The Committee so considers the matter to rest in that status at this time.

[fol. 295] Mr. Anastaplo: Proofs are—except for material I will be submitting in the course of my argument. And I should also add—

Commissioner Stephan: What kind of material do you mean?

Mr. Anastaplo: Documents or—

Commissioner Stephan: Well, I think that is part of your oral argument.

Commissioner Christianson: There may be documents which you want us to make part of the record, which would be exhibits; is that true?

Mr. Anastaplo: Yes, sir.

Commissioner Christianson: Are you going to ask to present exhibits?

Mr. Anastaplo: The thing is, the oral argument proper is not ready to start yet. Part of the oral argument will include testimony about particular facts, which I would like to consider part of the record. If you will let me proceed, I think it will be clear what I am doing.

Commissioner Stephan: You are still talking about covering the additional evidence and your argument in two hours; is that right?

Mr. Anastaplo: Yes, sir.

Commissioner Stephan: All right. You may proceed.

Mr. Anastaplo: I hope to, if I can go through.

Commissioner Stephan: You may proceed.

Mr. Anastaplo: Let me say first of all that I have taken to heart the advice and admonition given me, toward the end of our last meeting. I have decided, that is, to forego any right I might have had to present oral argument to [fol. 296] you and to combine in a written statement almost everything I had intended to submit in oral argument and in oral testimony in a written brief. My only stipulation, if I am to proceed in this manner, is that the papers I submit be incorporated in the body of the transcript itself, by being typed on stencils, as testimony heretofore has been. Although I spent much of last week preparing this material, it is not in the form appropriate for photostatic reproduction, and besides, you will find my typewriter ribbon is rather worn. There are, in addition, more important reasons why I would like to ask that the material be incorporated in the body of the transcript itself, as if it had been submitted orally.

Commissioner Stephan: Are these papers ones that have been prepared by you, or something you are—

Mr. Anastaplo: By me, exclusively, and prepared in the form that can be presented orally or can be presented written.

Commissioner Stephan: You mean rather than have them as exhibits to the transcript you wish to have them appear in direct chronological order?

Mr. Anastaplo: As if they were read off; I am prepared to read them off.

Commissioner Stephan: I think before we can rule on that, we will have to see what they are. I haven't seen any enormous objection to it offhand.

STATEMENT BY MR. ANASTAPLO

Mr. Anastaplo: May I say, first of all, I should like to submit an expanded version of the remainder of the statement I would have made orally, on Commissioner Young's use of the Rockafellow case, and what that use shows us about the procedures and methods of the Committee. I

think it has a value for my purposes, irrespective of the ruling made earlier by the Chairman. I will leave it to you to decide how you want that remainder presented to you. [fol. 297] Because I cannot anticipate your desires, I have prepared successive statements which will unavoidably overlap. And as to this, too, you will soon see what I mean. Some repetition in it will be inevitable. Let me proceed further by saying that I am acting this way not because I think it would be improper to deliver oral argument but because I want to make it clear that I am willing to cooperate as fully as possible with a very busy Committee. In some ways I would prefer to deliver oral arguments, not only because I would thereby be certain you would have an opportunity to know what my arguments are, but also because I would also have had the advantages of meeting objections of the Committee with which we are most intimately concerned—objections the Committee might have raised to particular arguments when they were made. In saying this I may place too much emphasis on the value of extended oral argument. I was privileged during my most recent visit in England to spend several days listening to the argument of a relatively minor contracts case in the Appellate Court. My impression was that the court was very likely to know when that argument was over, just what the facts and issues were and were not, and I could not help but compare what happened in 1954, when the Illinois Supreme Court was misled with respect to the vital fact and the crucial issue in my own case. This misleading I will spell out in my final statement.

We have talked from time to time throughout this hearing of oral argument at the end of it. And I must say I have in a way looked forward to it, but I have encountered what I took to be at the last meeting considerable resistance to such argument from me. That may have been partly my fault. It has been made more than clear how unreceptive you would be to extended oral argument. On this, at any rate, judgment has not been reserved.

Commissioner Stephan: I want it to be perfectly clear [fol. 298] to you that if you wish to make oral argument, you will have a reasonable time in which to make it and we will be very happy to listen to it. I don't know what you

mean by "extended," but by "extended" you must mean something more than is conventional, because you are quite entitled to make all the argument you want to make.

Mr. Anastaplo: I have taken literally your earlier statements that I would be able to say as much as I wanted to, bearing in mind the consequences upon the abuse of that privilege on my part. But I really don't want to even appear presumptuous on this point or to insist upon a prerogative the exercise of which might create prejudice and thereby distort the issues. I certainly want to avoid bitterness and recrimination at this stage of the proceedings.

Commissioner Stephan: Well, you certainly wouldn't create any bitterness by making an oral argument.

Mr. Anastaplo: No, I am not suggesting that oral argument is being prohibited to me.

Commissioner Stephan: It is being proffered to you if you wish it.

Mr. Anastaplo: Yes, sir. Permit me only to comment at this time upon one specific objection that has been lodged against my analysis thus far of the Rockafellow incident. That is, it was said at the end of the last meeting by one Commissioner that he regarded what was being said as inappropriate argument and even offensive, if I remember correctly—that is, he was referring to the judgments I had expressed about Committee proceedings in general, on the basis of Rockafellow and other instances in the hearing. Now, there is seen here, I respectfully suggest, the double standard that has been applied throughout the rehearing. [fol. 299] My attempt to spell out how and why your procedures are inherently unfair and to illustrate what I mean by the use of the Rockafellow incident, is immediately disparaged as offensive, but highly improper and unfair questions about religion and politics, truly offensive questions, if I may say so, have been passed by without a word of censure or caution by any of you at the time. I believe that I show in the remainder of my statement that the use of the Rockafellow case was clearly improper and unfair, and certainly irresponsible, even if it is assumed that that case is still good law. I also indicate, as I have done to some extent already, how and why this impropriety, unfairness and irresponsibility, have not only been permitted, but even

encouraged, by Committee practices and procedures. This Committee has from time to time pointed to its practices and procedures, to justify what it is doing or to challenge what I have been claiming. I think it therefore not only necessary, but even legitimate, therefore, to show what is wrong with these practices and procedures, however much of an indictment of the Committee it might seem to you. I believe, therefore, that the Rockafellow case incident and your acquiescence in that incident and your questions based upon that case, clearly demonstrate to reasonable men what is wrong with the way the Committee conducts its business. Therefore, the analysis I offer you is therefore vitally necessary, to consider my view of the case. May I, however, continue to stress my willingness to help improve the practices and standards that I am compelled to criticize. I assure you I would not have gone to all this trouble throughout the years, for my benefit alone. I submit, then, Mr. Chairman, for inclusion in the body of the transcript at this very point in the transcript the remainder of my analysis of the use made of the Rockafellow case, under the [fol. 300] authority of this Committee. This statement which was expanded somewhat this past week, I was prepared to make at our May 19th meeting. If there is no specific request that I should read this statement, I will transmit it to the Chairman now, for inclusion in the transcript, as if it had been delivered orally.

[Mr. Anastaplo submitted the written statement to Commissioner Stephan.]

Commissioner Stephan: I will ask the stenographer to incorporate this in the record at this point. I would like to have it appear on the record that this document that has been handed to the Chairman has not been read by any of the Commissioners; whether they have comment on it or not remains to be seen after the record is completed. I take it you would have said these very things at this moment if we had decided that was the procedure.

Mr. Anastaplo: Yes, sir, that is true. I am willing to do so now, if you like.

Commissioner Stephan: We will take it for inclusion in the record.

Mr. Anastaplo: I should like—

Commissioner Moses: May I suggest that it show in the record as being the portion that was not orally presented at this time, so that the Commissioners, if they see fit, may be able at a later date to deal with this particular portion of the argument.

Commissioner Stephan: Well, let us put it this way: That this will appear in the record immediately after the conclusion of this sentence that I am speaking.

[fol. 301] [The document, consisting of 14 typewritten pages, which the reporter was instructed to incorporate in the transcript at this point, is as follows:

[Balance of statement on *Rockafellow* case and the religious inquiries.]

"May 26, 1958

It was incredible to me, as I have already indicated, that an 1856 case incorporating obviously outmoded doctrine on the religious issue should have been taken so seriously by the honorable commissioner and by this Committee on April 23. (Transcript, page 210.) To reserve judgment on certain lines of questioning—if that is in fact what the Committee is doing—is to permit prejudicial questioning to develop, prejudice that no later stipulation can completely remove. Such things as this sometimes make me wonder whether anyone but me takes seriously the Constitution, constitutional law and the rule of law.

After the hearing of April 23 and before our May 19 meeting I stopped off one afternoon in a law library. Using standard research guides, I found within fifteen minutes a reference to *Hronek* v. *Illinois*, 134 Ill. 139, an 1890 case. This is the case to which the honorable commissioner belatedly and unobtrusively referred us at the beginning of our session of May 19. Even here we see the difference between the offense and its correction. The honorable commissioner had built an elaborate scheme of questioning on his 1856 case. We find several pages on this matter in the transcript. But the correction is made in one remarkably restrained sentence. Nothing is said about the validity of the questioning built on the discredited case or about the justification of my refusal to answer such improper ques-

tioning. All is silence. I propose to show that the 1856 case was woefully inadequate for the honorable commissioner's purposes, even on its face. But first, let me say a few words [fol. 302] about the 1890 *Hronek* case.

I have taken the precaution that all first-year law students are admonished again and again to take, to Shepardize the case. My case has not been overruled, questioned or distinguished on the point for which I am citing it. That is, I can legitimately say, I don't find it has been overruled or modified since then. Instead, there are many cases reaffirming the doctrine there set forth. Among them are,

1. *McAmore* v. *Wiley*, 49 Ill. App. 615, 617 (1893);
2. *Henley* v. *Chicago City Railway*, 180 Ill. 397, 404 (1913);
3. *People* v. *Schladweiler*, 315 Ill. 553, 555 (1925);
4. *People* v. *Marsh*, 403 Ill. 81, 91 (1949).

In fact, just as I had predicted both on April 7 and April 27, the doctrine of the *Hronek* case on this point is now the rule in virtually all jurisdictions. (Transcript, pages 145, 210.)

Let me quote some excerpts from *Hronek* v. *Illinois*, 134 Ill. 152, which invalidate the 1856 *Rockafellow* case:

> '. . . The constitution [of Illinois] provides that no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions . . .
>
> 'The obvious meaning of the provision in the constitution is, that whatever civil rights, privileges or capacities belong to or are enjoyed by citizens generally, shall not be taken from or denied to any person on account of his religious opinions . . . It is manifest, that if the legislature may prescribe the test of belief in rewards and punishments, they may impose any other test or qualification that, in the judgment of those entertaining the dominant belief, may be necessary to afford the requisite sanction . . .
>
> 'We are of the opinion that the effect of this constitutional provision is to abrogate the rule which obtained

in this State prior to the constitution of 1870, and that there is no longer any test or qualification in respect to religious opinion or belief, [page 153] or want of the same, which affects the competency of citizens to testify as witnesses in courts of justice . . .'

[fol. 303] This passage only confirms what the Committee should have known anyway, that there had been a crucial and definite shift in constitutional thinking on this point, a shift that all of you should have realized, if only from reflection upon your daily experience in court. And, of course, it is significant to note what has speeded up this shift in Illinois, the Illinois Constitution of 1870. This is representative of what I have been confronted with all along: the Committee had simply refused to take account of an intervening or relevant constitutional provision or constitutional decision. Unfortunately, this has happened again and again during the course of this rehearing.

I again found myself, before our May 19 meeting, in a law library one afternoon and the antiquarian in me decided to spend a few minutes with the case that the honorable Commissioner had beseiged me with April 23, *Central Military Railway Company* v. *Rockafellow*, 17 Ill. 554. I sometimes think, gentlemen, that you will not really appreciate and respect my case until you come to the conclusion that Providence has been particularly concerned with my welfare throughout all these years of controversy with the Illinois bar. For one thing, I have been fortunate to be able to make the contribution I have, and to preserve and improve the tone as well as the rationale of my position as I have gone along. There have also been such windfalls as the statement by the Illinois Supreme Court Justice reported anonymously to you February 28th, a statement which undermines for reasonable men the position of those making the inquiries now singled out as significant with respect to me. And then, on St. George's Day, I was confronted with a paper dragon to dispatch—that is, the honorable Commissioner's case of 1856, a case and argument seriously advanced and seriously permitted and received by this Committee.

[fol. 304] In the use of that 1856 case there are exposed for all to see the inherent unfairness built into the Com-

mittee's methods and, I submit, the value of the proposed changes I set forth in my letters in the summer of 1955 to a member of the Supreme Court of Illinois. But regardless of whether you are interested in improving your procedures and standards, I am obliged to describe in some detail the inherent unfairness of which I speak in order that it may be obvious to anyone who studies this record that the Fourteenth Amendment has been repeatedly violated. Let us proceed then to an examination of the 1856 *Rockafellow* case. I ask you to consider it on its face, as if you knew nothing about any later cases.

I found, of course, the honorable Commissioner's quotation. It was, as he said, on page 554 of Volume 17:

> 'But one having no religion, believing in no God, and not accountable to any punishment for falsehood here, or hereafter, except his own notions of honor, veracity, and amenability to criminal justice, cannot be sworn, as no legal, moral, conscientious obligations or responsibility, in the view of the law, can be imposed by an oath, and he may not testify without.'

(May I note in passing, that this quotation does not seem to permit the distinction Commissioner Moses' tried to make on May 19 between 'swear' and 'affirm.' The religious test that he tries now to link only with 'swearing' would seem to apply also to 'affirming': 'he may not testify without'. I will say more about this later if necessary.) Indeed, I found the honorable Commissioner's quotation. But I could not help but read also the sentences immediately following upon the 'damaging' quotation in the same paragraph:

> '. . . he may not testify without. And this is no infringement of freedom of conscience, or violation of constitutional tolerance. He may take official oaths, and make ex parte affidavits, for no one but a party interested can object to competency, and that only to giving testimony against him, or, it may be, to sit as a juror; [citing case] and such acts as affect the rights of others.'

[fol. 305] The next sentence, the first sentence of the following paragraph, is,

'It is simply absurd to swear a witness to testify whether he is capable of taking an oath.'

Thus, even under the *Rockafellow* case, the spontaneous *voir dire* with which I have been confronted was conducted in the wrong way and at the wrong stage of these proceedings, just as I suggested at page 211. But let us put such refinements aside.

May I recall for you the Chairman's indication at our second meeting, that this is not technically an adversary proceeding. (This was at page 76. See, also, page 73.) Thus, even if the *Rockafellow* case were still law, it would *on its own terms* have no bearing either on my competency to testify in these hearings or on my competency to take the attorney's oath. In short, the honorable Commissioner's quotation is completely repudiated for the purposes for which he quoted it by the sentences immediately following the quotation, sentences which he neglected to add. I certainly appreciate the honorable Commissioner's fear, expressed at page 144, that I as an opposing lawyer might not deal fairly with him. Heaven only help me when this Committee abandons its impartial attitude and adopts the posture of an adversary.

By this time in my quest I thought it might be interesting if I should take a few minutes to read through the honorable Commissioner's case. Indeed, it is instructive reading.

We are told early by the Chief Justice who delivered the opinion of the Court in the *Rockafellow* case that the rule about the competency of witnesses which was being applied here was the common law rule. It was the old common law, a common law supposedly unchanged for a century, that the honorable Commissioner was relying upon to impeach me. And what does the Chief Justice tell us in this very case about the common law and the competency of witnesses? Among other things, the honorable Commissioner is told at page 552, that the common law renders 'blacks, mulattoes and indians incompetent, both in criminal and civil cases, against whites.' I suspect all of you

have seen Negroes testify in court, even against white men. [fol. 306] Should not one have wondered then whether the common law doctrine here sketched out still holds? Of course, the Civil War and the 1870 Constitution, to say nothing of the 13th and 14th Amendments, have changed the common law with respect to the competency of Negroes also.

Still, however much of a warning this may be to a responsible researcher into the relevance of this case, the incompetency of Negroes is not exactly the same as religious qualifications. So, to be absolutely fair, we should read further into this short opinion. Soon another warning comes. The Chief Justice refers to the law in other jurisdictions being virtually the same as that in Illinois. Except for Virginia, where, he tells us, there is a constitutional provision which, in effect, rules out any religious test for competency. The Virginia provision is quoted by the Chief Justice. Perhaps I am asking too much when I suggest that an experienced and responsible Illinois lawyer should have recognized this Virginia provision as perhaps relevant to the interpretation of a comparable provision in the 1870 Illinois Constitution. Once again, the careful reader might have wondered what the 1870 Constitution does to this case. But a reliance upon constitutions has become rather old-fashioned, I am afraid.

So, let us read on—on to the paragraph before the very one with which I was confronted on St. George's Day. There, the Chief Justice makes the following observations in explaining certain implications of the honorable Commissioner's common law doctrine about the competency of witnesses in adversary proceedings (this is at page 553):

> 'I have examined all the authorities accessible to me and need not review them; a simple reference may suffice, as I feel confident that no one can examine the whole without a conviction that the above rule is fully sustained. [Citing many cases and texts, including cases in Massachusetts, Maine, Tennessee, New Hampshire, Vermont, Ohio and England.] These cases only differ as to the belief of the present or future punishment by God for perjury, and they concur in the le-

> gality and necessity of administering the oath in the manner and form recognized by the witness as obligatory upon his conscience, according to the form used in the country and under the religion of his spiritual [fol. 307] faith. So a christian should be sworn upon the Bible or Evangelists, (or affirmed, as allowed by statute,) the Catholic upon the cross, the Jew upon the Pentateuch, the Mohammodan upon the Koran, [page 554] the Gentoo by touching the foot of the priest interpreter, and he touching the hand of another bramin or priest, et sic de similibus.'

You gentlemen have been in courts much more than I. Have you ever seen a Catholic sworn on a Cross, a Mohammodan on a Koran? Do you not wonder upon reading this case whether a Gentoo (a kind of Hindu, I suppose) would still be sworn by touching the foot of a priest? Should not a lawyer with thirty-three years at the bar have been put on notice, especially before proceeding to harass a defenseless and inexperienced applicant for admission on a very sensitive subject—should not an experienced lawyer have been put on notice by all these things I have pointed out that perhaps this pre-Civil War case was of value only to an historian? Instead, this quaint case provided the basis for prejudicial questioning, questioning permitted by the chairman over my strong objections and strongly endorsed by another member of the Committee. It is safe to assume that if a second member was moved to speak out openly against my refusal on principle to answer such questions as Commissioner Young's, other members of the Committee and readers of the record (both here and in Springfield) would be prejudiced against me by my refusal. To claim that the Committee is 'reserving judgment' on such matters is to permit prejudice and hostility to dig in and go underground. Even so astute a Committee member as Commissioner Moses did not 'reserve judgment' on this matter. I dare say that other members of the Committee were no more cautious than he with respect to this issue. (May I note for Commissioner Moses's consideration again that the last excerpt I have quoted also seems

to refer, as the Chief Justice indicates, both to 'swearing' and 'affirming.')

[fol. 308] I should like to bring to a close this tale of my adventures in a law library. They had been, as you see, very instructive up to this point. Then I was inspired to recall the honorable Commissioner's assurance to us that this case had not been overruled or modified in any way. Almost perfunctorily I thumbed through Shepard's Illinois Citations, expecting to find, because of what the honorable Commissioner had said, a lapse in this instance in the usual accuracy of that research aid. But, no, the honorable Commissioner's case had been cited many times since 1856—and in front of one of the citations was a telltale 'o'—the case had been overruled.. But I found what I assume the honorable Commissioner found when he checked this citation before April 23. The case had been overruled on another point, not on his. Still, the gods smiled: for further on down the column was a 'q'—the case had been questioned. And I found—I do not know what the honorable Commissioner found—I found that the case had been questioned on the very point for which the honorable Commissioner had used it. In fact, as you gentlemen know, 'questioned' is often the same as 'overruled'—and overruled is what this case certainly is, in effect. In fact, the case to which the citation sent me was the very one with which I began my inquiry into these matters, *Hronek* v. *Illinois,* 134 Ill. 139, the case I had first found by another method and which the honorable Commissioner later informed you about at the beginning of our May 19th meeting.

I checked all the cases listed by Shepard's down to April 1958, of course, and found still another case explicitly questioning, and in effect, overruling, the *Rockafellow* case, *Ewing* v. *Bailey,* 36 Ill. App. 191 (1890). The *Bailey* case, which is I believe even earlier than the *Hronek* case, is interesting also for the fact that it shows an intermediate tribunal setting aside on its own initiative a prior Supreme Court decision when ruling constitutional doc-

[fol. 309] trine (that is, the Constitution of 1870) had intervened. Unlike this Committee last Spring and even during these hearings, the Appellate Court thought it was

bound by the law of the land even against the Supreme Court of Illinois. (Transcript, pages 154, 157.) Must we not assume that the Supreme Court of Illinois would want you to be bound also by the law of the land, even against an earlier ruling by that Court?

Perhaps this is the appropriate time to refer to still another difference of opinion I have had with this Committee. (See Transcript, pages 177, 222, 225-226.) Some of you seem to suggest that I, as an attorney, would not pay enough attention to the Constitution as interpreted by the courts of the land. I admit that I would be obliged to subject the opinions of even the Supreme Court of the United States to a constitutional test even while I obeyed the Court's directives. I admit that I might well say the Court is wrong in some cases, just as you seem to think it is wrong in the *Konigsberg* case. But I can assure you that I can distinguish, both for myself and any client I might have, between what is right and what a court is likely to do in a particular situation. In fact, so far as we have gone, it has been the Committee and certain of its members who have failed to make a realistic appraisal of the cases by which they are bound. The *Rockafellow* episode is a striking case in point. The only thing I am puzzled about in this entire matter is how anyone could find the *Rockafellow* case without running up against a citation to other and much more recent cases that make it dead law. I cannot but recall that it was the same Committee member who, in the *Latimer* case, asked for a list of the Communist lawyers that Mr. Latimer purportedly had had dealings with, a list which proved too hot for this Committee to handle. Irresponsible as Mr. Latimer may have been, I must say that he was not without encouragement and assistance from the Committee side of the table. In short, irresponsibility [fol. 310] seems to be built into the Committee procedures and standards.

It was this same Committee member by the way who suggested earlier to me, at pages 146-147 of the Transcript, that my tactics before this Committee have made him suspect I am a Communist. I trust that you do not all take this attitude toward opponents in court who remember

the lessons taught them in their law school classes about civil procedure, legal research and constitutional law.

In any event, I submit that the handling by the Committee of these religious inquiries is essentially representative of the methods and standards of the Committee throughout the case, methods and standards that violate prohibitions with respect to due process of law as well as freedom of speech and religion under both the Illinois and federal constitutions. In fact, you seem to employ and defend an approach that can only lead to unfairness toward any applicant who has a mind of his own. The Constitution of the United States, to say nothing of Canon 22 of the Chicago Bar Association Canons of Professional Ethics, frowns upon such unfairness. I would be less than candid if I concealed from you my disapproval of much of what you have done.

At the risk of having the *Latimer* case brandished at me again (Transcript, pages 218-219), may I illustrate my criticisms of the Committee as a whole? (I should add in passing that the *Latimer* case does not hold, as some members of this Committee seem to think, that admission to the bar is a popularity contest. It is not my burden to make myself liked by you: there is nothing improper about my criticisms of this Committee if they are reasonable, temperate, relevant and sincere. In fact, considering the circumstances as well as the activities of this Committee [fol. 311] and its members, I suggest I have been remarkably self-restrained. Certainly, I have not indulged in any of the tactics described by the Supreme Court of Illinois in the *Latimer* case.)

That which has been done with the *Rockafellow* case is but a vivid illustration of what has been done with other cases by this Committee. I believe my application has considerable merit, regardless of what is held by the United States Supreme Court cases. I will say more about these cases later in my closing argument. It so happens, if I may anticipate, that the cases which are relevant, in the sense that this Committee is a state agency bound by them under both the Illinois and United States constitutions, reinforce my claim to a right to admission to the bar. The

Committee can and does point only to such relatively remote cases as *American Communications Workers* v. *Douds*. (See Transcript, pages 137, 141-142, 153-154, 225.) It seems content, if not determined, to ignore not only the spirit but even the letter of such cases as *Konigsberg, Schware, Patterson, Cummings, Garland,* all of which deal explicitly with bar matters. It even ignores the fact that the *Douds* case, which I have distinguished at page 225 of the Transcript, was before the Supreme Court of the United States when it passed on the *Schware* and *Konigsberg* cases. The opinion of the Court in the *Schware* case does mention the *Douds* case, but only to limit the application of the views of the nature of the Communist Party as of 1950 found in a concurring opinion in the *Douds* case. In fact, the Supreme Court says that

> 'that view [of the Communist Party] did not purport to be a factual finding in that case and obviously it cannot be used as a substitute for evidence in this case to show that petitioner participated in any illegal activity or did anything morally reprehensible as a member of that Party.'

[fol. 312] This is to be found at 353 U.S. 244. The Court is dealing in the 1957 *Schware* case with a man admittedly a former member of the Communist Party. May I also note in passing that even the *Dennis* case, which the Committee mistakenly relies upon from time to time (for example, at page 186, Transcript), is questionable in the light of recent Supreme Court decisions such as the *Yates* case. It is of more than historical interest to note that the Committee on Character and Fitness in 1951 delayed action for several months upon my application until the day after the *Dennis* decision was handed down by the Supreme Court of the United States. Perhaps it is naive to claim that my character and fitness underwent absolutely no change as a result of a court decision on an entirely different case several thousand miles away. (I was in Paris at the time.) Similarly, the *Konigsberg* and *Schware* cases have absolutely no effect on my character and fitness. It should be sobering for this Committee to

reflect upon the fact that if I am fit now, I was fit two years ago; if I am fit now, I was fit eight years ago, both before and after the *Dennis* case. I must point to Supreme Court cases only because this Committee does not restrict itself to its proper function of passing upon my character and fitness.

I am compelled to submit, therefore, that the Committee chooses to evade or ignore the Constitution itself, just as the Illinois Constitution as well as the Federal were ignored in the spectacular *Rockafellow* episode that I have described. This Committee should embrace rather than disparage by its conduct and attitude such sentiments as those found in the *Barnette* case, at 319 U.S. 642:

> 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodoxy in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.'

[fol. 313] This famous passage from the pen of Mr. Justice Jackson is quoted, implicitly reaffirmed and related to bar admission matters by the opinion of the Court in the *Schware* case at 353 U.S. 244. It is this passage that should serve as preamble to the Committee's statement of standards and pro . . lures. It is such a passage that should be impressed upon applicants to the bar rather than intimidating questions about their political opinions and associations.

I further suggest that this Committee should have realized, even without reference to any of the cases I have mentioned, the appropriateness both with respect to political as well as religious inquiries of the warning found in the *Hronek* case, at 134 Ill. 152,

> 'It is manifest, that if the legislature may prescribe the test of belief in rewards and punishments, they may impose any other test or qualification that, in the judgment of those entertaining the dominant belief, may be necessary to afford the requisite sanction . . .'

Is not such a policy behind the political and religious protections of the First Amendment? Once you start there does not seem to be a stopping place. We started with inquiries about the Communist Party and the Ku Klux Klan and ended with inquiries about God, the Republican Party and the Democratic Party. (Transcript, pages 46, 43, 144-145, 203-204.)

In short, may I respectfully submit, this Committee is not only sometimes callous with respect to elementary notions of fair play and the rule of law, but it is disturbingly out of touch with the Constitution itself. I should think, nevertheless, the least you could do is to announce beforehand the lines of inquiry to be pursued at a hearing. If ordinary due process considerations do not lead you to such a practice, one would think self-defense should.]

[fol. 314] Mr. Anastaplo: And now I begin to speak at the conclusion of the last sentence in my statement.

Commissioner Stephan: Right.

Mr. Anastaplo: I have three motions with respect to the use of the Rockafellow case and the questions thereon, which you may want to consider at a later stage, i.e., after you have read the statement. I had planned to summarize the statement; I have a summary available. Perhaps—let me summarize the statement, quickly. This is a statement about the Rockafellow case which I have analyzed with some precision and in considerable detail in my statement which is incorporated now in the record.

As you all know by now, that case was dead law, within a quarter of a century after it had been decided. The 1870 Constitution had taken care of that. I have shown how irresponsible and unfair the use of the case was, even if it were assumed that it had not been overruled or modified by subsequent cases. I have shown in this statement that you have not yet had a chance to read, that the case was limited in the very paragraph from which Commissioner Young quoted, to adversary proceedings and perhaps to jurors. It is specifically stated in that very paragraph that its ruling does not apply to official oaths or to *ex parte* proceedings; only a party interested, even in the Rockafellow case, could object to competency of a

witness. I have shown furthermore that there were so many oddities, to say the least, in the case, as to make any responsible reader wonder whether any part of the case should be taken seriously. And I have also shown how the most elementary check through Shepard's, and I suspect through any other standard research guide, would have revealed the hopeless inadequacy of this case. In fact, I still do not see how anyone could have found this case, [fol. 315] without finding a number of caveats. But the ways of the law are wondrous to behold. The cases I have found not only undermined the Rockafellow case, they undermine—they completely repudiate the line of questioning about religious matters with a view to establishing competency, that has been followed in this sort of case. I believe that is enough for the moment on that.

Now, I should like to have you rule in a more formal form than you have, than you did at the beginning of the session, that the inquiries into my religious beliefs were improper and irrelevant under the law of the land and for the purposes of these proceedings. I should further like to have you rule that my refusals to answer those inquiries constitute no adverse evidence with respect to my qualifications for admission to the bar. I understand that, in a sense, some aspects of these two rulings have already been made. I even venture to suggest and request that an even fairer ruling now, and report later to the Court on this point, would be to the effect that such refusals as mine under these circumstances, really constitute highly favorable evidence with respect to bar admission qualification. That is, I assume that the legal profession should encourage applicants for admission to the bar, as well as lawyers, to stand on principle and to resist vigorously official usurpations of authority. I take it, Mr. Chairman, that you are not prepared to make this ruling until after you read my statement.

Commissioner Stephan: That is correct.

Mr. Anastaplo: The next order of business as far as I am concerned, are a few remaining matters before I deliver to you my closing statement.

The first is with respect to the right of revolution. I have been reflecting since our last meeting upon Commis- [fol. 316] sioner Moses' request of me that I show the Committee in the copies of the Illinois and Federal Constitutions that he produced, just where the right of revolution is to be found. I have not tried since then to find any passages in addition to those I read to you in support of my position. I suggest I have found far more supporting matter for my right of revolution position in the Constitution of the United States, than the Committee has for its general position, in the course of this rehearing. I believe the volume containing the Constitutions that Commissioner Moses gave me last meeting was the first in 1934 Smith-Hurd Illinois Annotated Statute series. Is that correct?

Commissioner Moses: I think so.

Mr. Anastaplo: Some of you might recall that I referred in passing to the Declaration of Independence, that I saw reproduced in that volume. My experience—

Commissioner Moses: May I say the pocket supplements brought it up to date, the volume I gave you. You may not have observed it—the pocket supplements.

Mr. Anastaplo: The Declaration of Independence is still in there.

Commissioner Moses: The Declaration of Independence is contained in the volume, yes.

Mr. Anastaplo: I mean, there is nothing in the pocket supplements to deny the presence of the Declaration of Independence.

Commissioner Moses: There is nothing in the pocket supplements to suggest that the Declaration of Independence had not been promulgated at the time it was.

Mr. Anastaplo: I see.

Commissioner Stephan: It is not repealed.

Mr. Anastaplo: It has never been revoked?

[fol. 317] Commissioner Moses: There is nothing in there to suggest it has.

Mr. Anastaplo: My experience with the Rockafellow case has taught me that curiosity is very valuable in dealing with this Committee. Consequently, I address myself

to the simple question, how does the editor of the volume explain the inclusion of the Declaration of Independence in a set of Illinois statutes? I find at page iii, that is Roman numeral iii of this edition, the following editorial foreword under the sub-title, "Earlier charters in organic laws": "For purposes of convenient reference there has been set out the text of various earlier charters and laws affecting the organic law of Illinois. These include the Magna Carta, the Declaration of Independence, the Articles of Confederation, the U. S. Constitution, the Northwest Ordinance of 1787, and in addition, various Federal Acts of Congress, affecting Illinois, down to the admission of the State in the Union, in 1818." Thus the Declaration of Independence is referred to by this editor as "affecting the organic law of Illinois." Of course, an editor's observation is far from conclusive. In this case, however, in my opinion, the editor only reports what should really be common knowledge, that the Declaration of Independence is in some sense a constitutional document. A superficial check reveals that the Declaration of Independence has been included in sets of the Illinois Annotated Statutes, at least as far back as 1885. I have already indicated to you how the Declaration is tied in with the Constitution itself, through Amendment Nine, for instance. We should not be too quick to dismiss the Declaration as outdated or irrelevant. Consider the word of President-elect Lincoln, in Independence Hall. And here I quote. "You have kindly suggested to me that in my hands is the task of restoring peace to our distracted country. I can say in return, sir, that all the political sentiments I retain have been drawn [fol. 318] so far as I am able to draw them, from the sentiments which originated and were given to the world from this hall in which we stand. I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence." That is the end of the quotation.

Thus, even with a terrible rebellion confronting him, the most illustrious member of the Illinois bar did not disavow the Declaration of Independence, in which is enshrined the principle of the right of revolution. With only a Committee on Character and Fitness confronting me,

I can safely do no less. May I remind you also that "Fourscore and seven years ago," with which the Gettysburg Address opens, take us back not to the ratification of the Constitution, not to the Surrender of Cornwallis at Yorktown, but rather to 1776, and the Declaration of Independence. I would rest with Lincoln on that particular point, as to the value of the document as a constitutional factor. I sometimes rebuke myself for the amount of hair-splitting and refinement to which I have acquiesced, in answering your carefully, if not deviously, worded questions, about the exact moment in some unforeseeable future when I might conceivably be obliged to exercise the right of revolution. Really, all this has been unbecoming. Can you gentlemen deny that you believe in the right of revolution as much as I do? Do you dare admit that you would sit idly by if tyranny comes, or if you would sit by, do you say you would see something immoral or unfit in those of your fellow citizens who strive to re-establish constitutional government, or to protect it before it is torn down? Certainly you cannot believe what your cautious questions and timid formulations would suggest you believe. I put it to you, there is nothing I have said about the right of revolution that all of you who have thought about the matter do not also believe in. Let us throw [fol. 319] caution and timidity to the wind for the moment and indulge ourselves in the proud proclamations of a free spirit.

Permit me to read to you two excerpts from a lecture on law, in 1790, by Justice James Wilson of the United States Supreme Court, one of the authors of the Constitution. These excerpts are reproduced in my closing argument as well, but they bear repetition, considering how much we have questioned our heritage these last few months. Mr. Justice Wilson says at one point, to an audience that included President Washington—and here I quote: ". . . . the principles of our Constitutions and governments and laws are materially better than the principles of the constitution and government and laws of England. Permit me to mention one great principle, the vital principle, I may well call it, which diffuses animation and vigor through all the others. The principle I mean is this,

that the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their Constitution, at whatever time, and in whatever manner, they shall deem it expedient." And again a few minutes later Mr. Justice Wilson reminds us of dogma we should not have forgotten. Again I quote: ". . . a revolution principle certainly is, and certainly should be taught as a principle of the constitution of the United States, and of every State in the Union. This revolution principle—that, the sovereign power residing in the people, they may change their constitution and government whenever they please—is not a principle of discord, rancor or war: it is a principle of melioration, contentment, peace. It is a principle not recommended merely by a flattering theory; it is a principle recommended by happy experience."

May I once again assert that I have never said anything [fol. 320] about the right of revolution that did not spring from the sentiments embodied in the Declaration of Independence. I must continue to defend that Declaration, even if it means my continued exclusion from the bar of this State. But perhaps the prospect of such penalization can now be disposed of. Is the Chairman, for the Committee, prepared to stipulate—

Commissioner Stephan: Would you repeat that? I didn't hear it.

Mr. Anastaplo: I am sorry. Is the Chairman, for the Committee, prepared to stipulate or to rule that my views on the right of revolution constitute no adverse evidence with respect to my character and fitness and with respect to my willingness and ability to take the oath of attorney?

Commissioner Stephan: Do you mean at this moment?

Mr. Anastaplo: Yes, sir.

Commissioner Stephan: No. We certainly will rule on that point and make a finding on it, but I am not prepared to rule now.

Mr. Anastaplo: Well, would you be prepared—is it simply a matter of a few minutes, or is it that a longer period of time would be required? I could stop and permit you a chance to deliberate.

Commissioner Stephan: I think it would result in a most extraordinary proceeding and quite a disorganized one, if an applicant were permitted in a matter like this, to get, in effect, declaratory rulings at different stages of the hearing. We have an ultimate question before us, whether you have a fit character to entitle you to be admitted to the bar. That is the ultimate question. There are a lot of subsidiary questions we have to determine before we reach the ultimate one.

Mr. Anastaplo: I have several such rulings to suggest, in the hope that it might affect my final statement.

Commissioner Stephan: The Supreme Court of Illinois [fol. 321] directed us to inquire into your views on the right of revolution. I suppose it is quite logical that in the findings we make in the report we make to the Court, this point will be covered. But I am not going to anticipate how the Committee will decide it by ruling at this time.

Mr. Anastaplo: I have heard of instances where courts stopped proceedings on the basis that they had heard enough to establish a point that is being argued.

May I go on to the second remaining matter? I wonder if I may be permitted to say a few words about the case of *Ira Latimer*, 11 Ill. 2d 327, which has been referred to a couple of times in the course of these hearings. But I have to say it has a bearing on my case, at least to the extent that my ideas about these matters are thereby set forth for you to examine. I realize, however, Mr. Chairman, that you made a ruling last time on this matter, and I want to stop for a moment before I go on.

Commissioner Stephan: As far as the Latimer case, in the opinion of the Court, has any relevance to this case, you certainly are entitled to talk about it. The ruling last time, if you recall, was directed to, not so much as to how the Latimer case bore on your case but what you thought of the way the Committee handled the matter in the Latimer case. I just caution you, we were on your case, and not Latimer's.

Mr. Anastaplo: In a way, that is what I am going to talk about now, with a view to explaining my views on these matters which seem to be important, and also with a view

thereby to exploring what the Committee methods and procedures are like, which are also important for my case.

Commissioner Stephan: To the extent you think the Committee's procedures are unfair, you have a perfect [fol. 322] right to argue them at this time.

Commissioner Moses: I understand you are now in a sense offering evidence as to your character and fitness, rather than arguing the application of the Latimer case to this case, as a legal matter?

Mr. Anastaplo: I think I am doing both.

Commissioner Moses: To the extent that you are doing the one I suggested, do you intend it be taken as factual?

Mr. Anastaplo: Oh, yes, everything I say—no matter what I say, you can take as factual.

Commissioner Moses: I don't mean factual as distinguished from untruthful. I mean this is evidence you are now proposing to offer; it may also be useful as a legal argument, but you are offering it as evidence of your character and fitness.

Mr. Anastaplo: I take it, Mr. Moses, that even my closing argument would be evaluated by this Committee with a view to its temperateness, sense of responsibility, and fairness, in evaluating my character and fitness.

Commissioner Moses: I see.

Commissioner Stephan: I think at what point you are a witness and what point you are an advocate here, is rather wavy. That is why I asked you a little while ago, if you considered the proofs closed. I take it you don't, and you are still—

Mr. Anastaplo: I can't consider them closed, because there are some matters I testify to, in effect, in my closing statement.

Commissioner Stephan: It would be helpful if you had a mustache or something that you could put on and take off—

Mr. Anastaplo: I could change chairs. Strange as it may seem to you, Mr. Latimer's tactics and conduct, which are [fol. 323] condemned by the Supreme Court in its opinion, are a caricature of this Committee's procedures and approach, so far as I have experienced them. That is to say, Mr. Latimer seems to have taken your approach too

seriously. I think it disgraceful, nevertheless, that several members of this Committee, as a result of Mr. Latimer's charges, felt obliged during the course of his hearing to parade to the witness stand or to submit affidavits in order to testify about their affiliations, political opinions or conduct. The dignity and function of this Committee are worthy of much greater protection than that on the part of both bar applicants and Supreme Court Commissioners. Still when the Committee proceeds as it does, perhaps it is inevitable that the members of the Committee itself are put on trial as much as the applicant. Nevertheless, the judicial process should not be mistreated in this manner, however much seeming logic there was in Mr. Latimer's contention that all members of this Committee should be examined for communist beliefs and associations. I want to make clear that I am not suggesting this.

Commissioner Stephan: We are grateful.

Mr. Anastaplo: Or examined for any other kind of beliefs, I may add, except only those relating to your competence as Commissioners, which I trust the Court has passed upon in selecting you. Questionable as some of Mr. Latimer's conduct and tactics may be, and it was on the basis of these that the Court upheld his exclusion from the bar, I respectfully suggest that the entire record in that case is so tainted with controversy about communism, and with inquiries about political affiliations and opinions, that a *de novo* inquiry may have been necessary. I realize that Mr. Latimer did not raise objections to such inquiries, and that he even endorsed the decision of the Court in my own case, but the taint is there, nevertheless. [fol. 324] with the result that the controversy got so hot, and the pressure so high, that the man's character may have been distorted or presented inadequately. I remind you that there have been distortions even among members of this Committee, from time to time, even when there have been no pressures put on them affecting their careers and reputations, and I simply ask that you take that into account, the Chair take into account the role of the applicant who is affected in this way. I gather from the abstract of the record and the opinion of the Court that one of the damaging items against Mr. Latimer was an

irresponsibly compiled list he submitted of allegedly communist lawyers he had known while a member of the Communist Party. As you know, he was requested by a member of this Committee to compile and submit this evidence. However irresponsible the Committee member might have been in making this request, that did not mean Mr. Latimer could name just anyone he pleased. But may I suggest to you that Mr. Latimer's list so far as I could evaluate it from the materials I have seen—and I have not seen the list itself, if I remember correctly—Mr. Latimer's list is not as unreasonable as it may seem, provided certain assumptions are made. He took seriously, it seems, that naive manual on how to detect communists, issued a few years ago by the Senate Internal Security Committee, and proceeded to construct his list accordingly. Once you as a Committee start this business of communist catching, can such naive though misguided zeal as this on the part of an applicant, really be condemned? It has recently been brought to my attention that the American Bar Association has rejected for admission a couple of distinguished applicants who listed among their bar associations the National Lawyers Guild. This rejection was based on the assumption, it was later learned upon inquiry, that the National Lawyers Guild had been designated a [fol. 325] communist front organization by the Attorney General. It was later learned, also, upon investigation by the A. B. A. when protests were made, that the American Bar Association committee making this assumption had simply been mistaken about the facts as to what the Attorney General had done. Can it be that Mr. Latimer did no more with his list of fifty communist lawyers, than the American Bar Association, with all its personnel and resources, had done? Mr. Latimer may even have been correct, for all I know, in what he said about some of the past affiliations of members of this Committee. Let me make it clear that I am not speaking now of any present members of this Committee. I direct myself primarily to the problem of Committee procedures and what they lead to. Mr. Latimer, as I have said, may have been correct in what he said in a few cases, but he drew the wrong conclusion when he charged members of this Committee

with communist sympathies. Rather, as I knew from my own experience in 1951, when my most zealous inquisitor had so recently been identified with left-wing causes, the motivation may not be communist sympathies, in some cases, but a desire to erase from the minds of colleagues, the memory of youthful and not so youthful indiscretions. Mr. Latimer, I am afraid, mistook penance, breast-beating and bullying tactics for communist sympathizing. May I suggest also that having this kind of inquiry almost inevitably permits such abuses by some members of the Committee. To the extent Mr. Latimer is unfit, it is because of conduct that would have disqualified him, whether he was a member of the Communist Party or the Republican Party. Would not a reasonably fair hearing of such a man have to be one in which the Committee makes it perfectly clear from the start that it is not interested in the question of communism, but only in the problem of character and fitness? You simply cannot expect most applicants, espe-
[fol. 326] cially those who have been knocked about a lot by the world, to keep their heads, when engaged in controversial political squabbles. All of this, as I have said, should help you appreciate my own position in these matters. Besides, I feel obliged to speak out against possible injustice.

The next remaining matter has to do with the problem of election judge service.

Commissioner Moses: Do I understand that you consider the Latimer case improperly disposed of by the Supreme Court of Illinois? Is that your point?

Mr. Anastaplo: For all I know, Mr. Moses, the man may have behaved abominably, but taking my view as to what proper questioning is, I would say that the matter should be reconsidered with a view to seeing whether the abominable practices or conduct can be explained and studied in a context entirely free from political inquiries.

Commissioner Moses: Is that as directly as you feel you can answer my question?

Mr. Anastaplo: Yes, sir. Yes, sir. I mean, obviously it is improperly disposed of if, as I think, questions about communism tainted the entire record.

Commissioner Moses: And you so think?

Mr. Anastaplo: From what I have seen of the abstract of the record. I have not seen the entire record. I would have to see all of it. The effect of my comment simply is that I question it and think that the problem remains. However terribly a man may have acted, I know from my own experiences that inquiries into this kind of area can corrupt the entire proceeding and simply make people do things and say things they might not have otherwise done. There also may have been in Mr. Latimer's case, [fol. 327] a very frustrating experience, once having been a communist, now being an anti-communist, and finding no friends in either camp—that can be very terrible, I suspect. And I think that factor should be taken into account.

Commissioner Stephan: Did I understand you to say we should restrict our inquiries into character and not communist affiliation?

Mr. Anastaplo: Yes, sir.

Commissioner Stephan: Do you think the two are mutually exclusive?

Mr. Anastaplo: Certainly in Mr. Latimer's case, when you know that he was not a communist, and it was stated in one part of the record that they agreed he was not a communist, I think—

Commissioner Stephan: You made the statement as if you were laying down a basic policy that we should follow.

Mr. Anastaplo: I think as a basic policy, it would be very good, in the State of Illinois, simply to say that, except in certain unusual situations, we will make no inquiries into political or religious matters. I would stress the need for laying foundations for such inquiries, and I would be very reluctant to go into them. I think in Mr. Latimer's case you may have enough to hang him anyway. I don't know; I don't know the gentleman and I know very little about him. But simply from reading the record and the opinion in the case, I know the problems that certain kinds of inquiries create, and the defensiveness which they engender, a defensiveness which results sometimes in very brash, imprudent things on the part of an excited applicant.

Now, may I get on to the election judge service? Commissioner Bane asked me, on April 23rd, as we were going

out of the room, to inform you if I should receive an an-
[fol. 328] swer from Judge Kerner in response to my letter of March 1st, a copy of which you have. In that letter, I reported to Judge Kerner who is, as you know, the County Judge in charge of elections, the fact that I might have on separate occasions served on request of precinct captains as election judge for both the Democratic and Republican parties in my precinct. I, of course, was interested only in doing a good job, no matter which party I was representing. I hope you appreciate that. It would not have occurred to me but for the Committee's comments that I might have done something improper. We have discussed this matter at pages 26, 32, and 201 and 205 of the transcript. I have also commented on this matter in my letter to you of March 27th. May I read to you the crucial paragraph in my letter of March 1st to Judge Kerner which I wrote immediately after you alerted me to the possibility that I might have been technically wrong in what I did.

> "It has been suggested to me"—I say—"that something more than nominal or *pro forma* identification with a political party might be necessary in order to qualify as election judge. If this is so, then I may have permitted myself to be led astray by well meaning but perhaps mistaken precinct captains. Will you please advise me whether, under the circumstances, I should resign my commission and return to the Board of Election Commissioners any fees that might have been improperly paid me?"

My guess would be that any such fees would relate to more than one such instance. I am not certain. I suggest that this honest error, if it is in fact even an error, has been magnified out of all proportion to its significance in the course of these hearings.

Commissioner Stephan: You are off the quote now?

Mr. Anastaplo: I am saying this, yes, sir. I was off my quote when I say, after, "improperly paid me."

Commissioner Moses: May I suggest, you say when you start quoting, but you never say, "unquote."

[fol. 329] Mr. Anastaplo: Yes.

Commissioner Moses. It would be helpful if you did both.

Mr. Anastaplo: I am sorry. I should do that. In any event, Judge Kerner does not seem to be concerned. As I reported at our April 23rd meeting, at pages 201 to 205, my only reply from the Judge, up to then, was the book of instructions for the primary election, April 8th. Because of various circumstances, I did not serve in that election but managed to secure a substitute. My only communication from Judge Kerner since our meeting—since Commissioner Bane made his request after our meeting of April 23rd—was a letter accompanying the book of instructions I received last Saturday morning for the judicial elections to be held in this city next Monday. Would the Committee care to express an opinion as to whether I should serve at that election? I know that the need for an experienced election judge is critical in my precinct, but I do not want to do anything that is in fact improper, or that may in these circumstances be interpreted by this Committee as being improper. Is the Chairman willing to stipulate or to rule that the evidence in this record with respect to my service as election judge in my precinct, should have no adverse effect on a determination of my character and fitness? I, of course, would be still inclined to regard it as positive evidence.

Commissioner Stephan: I cannot make such a ruling at this time, Mr. Anastaplo. This falls into the same category as these other things that you would like rulings on. My failure to rule in no way indicates my feeling in the matter, but you raise a point where you ask us to do something that just isn't possible under our procedures at this time.

Mr. Anastaplo: My impression is that the matter is so inconsequential that you can quickly dismiss it. Let me [fol. 330] also say that my intention is not to serve if your position is ambiguous or unclear about it.

Commissioner Stephan: I don't think it is fair to ask us to tell you whether you should act as a judge in an election that is approaching—

Mr. Anastaplo: I am not inclined to disregard anything you say, or any comments you make on matters. I take

seriously your opinions on these things. I may not do what you say in every situation, but I certainly am not going to disregard what you say and highhandedly proceed, while this matter is still under consideration, to behave in a way that might possibly be construed as improper.

Commissioner Stephan: Whether you committed an offense is something that is now a matter of history. Your sworn testimony that you did it in the best of faith and that you did it in error, and your willingness to right the situation, if any wrong was committed, I should think would weigh heavily with all Committee members, as those statements weigh very heavily with me.

Mr. Anastaplo: Let me go on to another matter. This is with respect to the evidence brought up last time in connection with Mr. K.

Commissioner Carey: Mr. who?

Mr. Anastaplo: K. I referred to a man who was formerly an applicant before the Committee and who subsequently was admitted, simply by initials, so we have no needless flaunting of names. I have, as you know, maintained from time to time that the Committee has absolutely no basis or foundation in the record for subjecting me to inquiries about political affiliations. I have also maintained that my refusal to answer such questions provide no adverse evidence against me with respect to my character and fitness. The state of this record makes both of these arguments even [fol. 331] more effective. I should like to establish even more clearly the state of this record with respect to these matters.

First may I remind you of a stipulation made, I believe by Chairman Thomas, at our last meeting, the meeting of May 19th, and here I quote:

> "... and in that connection I will tell you this, that no one has stated to this Committee that you are or have ever been a communist or member of the Communist Party or member of the Ku Klux Klan or member of the organizations or any of the organizations listed as subversive by the Attorney General's list."

That is the end of the quotation. I myself, as you know, am not interested in finding out or establishing whether

I am or am not a member of any of the organizations referred to by Chairman Thomas. But I am interested in establishing what the Committee knows or can be reasonably expected to know. In this way, I can show that the Committee's questions about affiliations have no foundation, relevance, specification, or constitutionally valid purpose. Chairman Thomas's stipulation came after I had referred to the bar admission cases before this Committee of Mr. Ira Latimer and of a Mr. K. Your Chairman could make the stipulation he made, even though Mr. K. and Mr. Latimer had presumably named a number of persons, lawyers and laymen, whom they knew in Chicago as members of the Communist Party. Both of these cases are discussed in the abstract of record which Mr. Latimer's counsel filed in the Supreme Court of Illinois, in the January Term of 1957. I find in Mr. Latimer's abstract a part of the transcript in which the then Chairman of this Committee, Mr. Stanford Clinton, assured Mr. Latimer that Mr. K. had named for the benefit of this Committee, every member of the University of Chicago communist cell he knew. This was at page 94 of the abstract. Presumably Mr. K. had been a member of that cell, although the record is far from clear [fol. 332] on this. In any event, Mr. Clinton, whose judgment, I must admit, I would not be inclined to rely upon too far, thought Mr. K. was in a position to reveal quite a bit about Communist Party activities on the University of Chicago campus.

Let me note in passing, inasmuch as the name of the University has been bandied around quite a bit in the course of these hearings—let me note in passing, for University public relations purposes, that the Communist Party activities on the University of Chicago campus, that even the most alert student might have heard of during the dozen years I have been there, have been overwhelmingly counterbalanced by the activities and publications of the University's Economics Department, for instance, the most conservative and respectable Economics faculty in the country. So if any of you are lying awake nights worrying about sons who are attracted to communist ideas, I advise you to send them to the University, where they will get a good

intellectual working over. Reactionary sons, I should add, can expect the same treatment. You may be positive of that.

I suppose that is enough for public relations purposes at this time.

Commissioner Stephan: The Chair so rules.

Mr. Anastaplo: I will reserve a few minutes for anyone from Northwestern who wants to say something.

Let us return to Commissioner Clinton and Mr. K. Mr. K., in the opinion of Mr. Clinton, told all he knew about Communist Party activities on the University campus before he was admitted to the bar. But according to Chairman Thomas, no one has ever named me as engaged in such activity, presumably not even Mr. K. I was amused to learn from the Latimer record that not even Mr. Clinton, who was such an excessively zealous foe of communists and [fol. 333]. communist fronts the last time I had anything to do with this Committee—not even he can make this claim about himself. Of course, the fact that no one has named me to this Committee proves little or nothing about whether I really am or am not a member of this or that, from the most strict logical point of view. But it does indicate that the Committee's questions about affiliations are insignificant and without foundation. I say all this proves nothing, even though I have spent virtually all my life, since Air Force days, on the University campus. All of this proves nothing about memberships, whatever it might show about the foundation for the Committee's questioning, simply because it is possible that I have been commuting weekly, or monthly, or however often is necessary, to Evanston, say, for Communist Party cell meetings or Ku Klux Klan clam bakes, or whatever else they might have up there. Although I have not testified about my affiliations, I believe the state of the record is such as to permit several rulings about the questions into affiliations. And these I would like to state.

Commissioner Stephan: Let me ask you a question. I am loath to interrupt you. I gain the impression at times, and I think maybe you have already addressed yourself to this comment—I gain the impression that you lay considerable emphasis on the fact that no one has informed this Com-

mittee that you were a communist, and that we have no independent evidence that you are.

Mr. Anastaplo: And I would also suggest that people have been asked about me.

Commissioner Stephan: You have also quoted people to us who have expressed their views as to whether you are or are not. Would it not be bad faith on your part to urge that type of evidence on us if you were in fact a communist? Wouldn't that be a form of deception?

[fol. 334] Mr. Anastaplo: But if I am in fact a communist, assuming I am the kind you think I might possibly be, such bad faith would be expected.

Commissioner Stephan: I don't think any of us can escape the impression that—

Mr. Anastaplo: If it isn't—

Commissioner Stephan: —that you are sending an indirect message to us.

Mr. Anastaplo: I am certainly not. And I also want you to note that it is not necessarily a matter of bad faith. I suspect that a lawyer is entitled in a case to make the arguments that the publicly-known facts in the case permit, even though he privately knows facts which might materially affect his arguments. I mean, is he obliged to bring forth all facts, however damaging they might be to his case? I know—I think that the prosecuting attorney would be obliged not to bring forth facts that might lead to the conviction of an innocent person. Would a defense attorney be obliged to bring forth facts which might lead to the conviction of a guilty person who might otherwise be acquitted? I am not suggesting I have any facts to bring forth. I am simply bringing the problem up to see whether bad faith is involved.

Commissioner Stephan: Do you see the problem that bothers me?

Mr. Anastaplo: I am not certain it is in bad faith, in speaking about these matters in this way.

Commissioner Stephan: I am not suggesting for a minute you are guilty of bad faith. I am saying it would seem that in urging these views upon us, that other people seem to hold, if you were in fact a communist, it would be quite a contradiction.

Mr. Anastaplo: I am simply saying that—the only view I referred to from other people was in the first hearing [fol. 335] when I quoted a member of the Supreme Court of Illinois, and that was for the purpose of showing a foundation or basis for what the Committee's questions were. In every instance since then, I have done it for the purpose of showing that there is no foundation in the record for the questions, whatever my real affiliations may be.

Commissioner Young: Mr. Chairman, may I offer a suggestion to Mr. Anastaplo, if he will accept it, that in his present position, although he sits there arguing, he is also in fact the client, and that he may have a different duty from that of a lawyer which he is not yet, and that of the client. And I think that the Chairman's inquiry was put to him in his position as an applicant and not as a lawyer.

Mr. Anastaplo: I say that as the applicant I do not think I am making any statement that is not perfectly legitimate. I say furthermore that it is a statement that needs to be made if certain objections with respect to or based on the First and Fourteenth Amendments are to be considered proper by this Committee and by the Illinois Court.

Commissioner Stephan: My statement was made in a friendly attempt to be helpful.

Mr. Anastaplo: These are the—

Commissioner Moses: I would like to ask a question in that regard, too, and it may help you in answering the other question. If I understand your position, it is a violation of the First and Fourteenth Amendments to inquire into communistic or any other affiliations of a political nature, in the absence of any evidence of any kind in the record suggesting that you might be a communist or a member of the Ku Klux Klan or the Silver Shirts, et cetera. I understand that point, that is one of your points, at least.

Mr. Anastaplo: Yes, sir, and also—

[fol. 336] Commissioner Moses: You are not making the point that you are entitled to a finding that you are not a communist, but you expressly refuse to assist the Committee in reaching that determination. Am I right about that?

Mr. Anastaplo: That is true. And I would say that finding is irrelevant for the purposes of this Committee.

Commissioner Moses: I would say that would be necessary in order to be consistent. So that when you tell us that neither any Justice of the Supreme Court nor any member of this Committee believes you are a communist, and you have told us that—at least that is your opinion—you are not offering that in support of a finding that you are not a communist. You are merely offering that in support of your position that there isn't any suggestion in this record justifying the inquiry in the light of the constitutional limitations upon inquiry. Is that right?

Mr. Anastaplo: Yes, sir. May I add one further point to what you say: not only that there is no evidence suggesting the need of such inquiry, or providing the need for such inquiry, but I also wanted to bring out the fact that there was more than simply no evidence. I was suggesting that there was in the minds of the Committee some information on this subject, some thoughts on this subject, which went the other way, even, and which would make even more apparent the lack of foundation for the questions.

Commissioner Stephan: We understand your position.

Mr. Anastaplo: Yes, sir. These are the motions I would like to make, and leave with you. I would like to have a ruling which I think is established by the record and by the law, that my refusals to answer the questions I have not answered constitute on this record no adverse evidence [fol. 337] with respect to my character and fitness for the practice of law. I should also like to emphasize the statement of the Chairman at page 117 of the transcript, that it is definitely not the Committee's position that a refusal to answer any question is *per se* or in itself considered adverse or obstructive for character and fitness purposes. I should also like to have, if you would care to give it to me, a stipulation that the constitutional position I have taken in refusing to answer these questions, seems to the Committee sincere and not frivolous. Would you be prepared, Mr. Chairman, to make that stipulation?

Commissioner Stephan: The Chair is going to reserve rulings on all these motions.

Mr. Anastaplo: Are you prepared to say at this time what questions, if any, that I refused to answer in the course of this rehearing, seemed to raise problems for the

Committee with respect to my character and fitness, and if so, why such particular questions, if any, do raise problems? This is not necessarily a ruling, but simply a matter of information to guide my further conduct in the course of this rehearing.

Commissioner Stephan: We have gotten into several areas where the persistence of the questioning and the character of the questions and the warning that you have been given from time to time about the materiality of the questions, should make clear the answer to the question you put to us now. I certainly would not at this time attempt to review a three or four hundred page record and tell you what question we thought was relevant and which one wasn't. I think you know the main areas of inquiry, and I think your suggestion is not a feasible one.

Mr. Anastaplo: I see. You mean, nothing stands out in your mind right now that you would care to point to as particula' important?

[fol. 338] Commissioner Stephan: There are several things that stand out in my mind.

Mr. Anastaplo: You would not want to state what they are?

Commissioner Stephan: I don't think I would, no. I don't know what stands out in other people's minds. These are matters that the Committee will get into when it reviews your case.

Mr. Anastaplo: I take it, then, you are not prepared to rule, either, or to stipulate, that, setting aside the fact of unanswered questions, and any other fact you might want to designate, there is nothing else in the record constituting adverse evidence with respect to my character and fitness.

Commissioner Stephan: I wouldn't care to rule on that, either.

Mr. Anastaplo: Then, is the Committee or any member thereof prepared to indicate what there is in the record that constitutes or might constitute adverse evidence with respect to my application, in order that I might have an opportunity to meet, explain, retract, or correct such evidence, before this rehearing closes? This is not an official designation, that I am asking for.

Commissioner Stephan: I think you have to act on the assumption that when a Commissioner asks you a question, it is in an area that he considers relevant and material to your qualifications.

Mr. Anastaplo: Well, the problem—

Commissioner Stephan: The significance to be attached to your answer by him and by others, is something that will have to await our review of the case.

Mr. Anastaplo: But we have already seen the effect of the Rockafellow case, and the religious inquiries, where that simple rule does not hold.

Commissioner Stephan: And you have been so informed, and—

[fol. 339] Mr. Anastaplo: And there is nothing else—

Commissioner Stephan: And the record has been corrected.

Mr. Anastaplo: There is nothing else you can point to as particularly distressing, in the record? I mean, I am not asking for a ruling; I am simply saying, is there anything that could be pointed to, that I might be able to explain or amplify, that might otherwise be left prejudicial, unnecessarily?

Commissioner Stephan: It seems to me incredible that you can sit there and ask us if there are any other areas that trouble us.

Mr. Anastaplo: Any areas that—

Commissioner Stephan: We have been sitting here now for five or six weeks, pursuing various lines of questions.

Mr. Anastaplo: I am sorry, sir, I didn't say any other areas; I say, things that are in the record.

Commissioner Stephan: I am answering your questions—.

Mr. Anastaplo: I mean, the problem for me is that there is nothing in the record that should trouble you. Perhaps I am mistaken. Perhaps I can be told what does trouble you, perhaps I can take care of it before I leave you.

Commissioner Stephan: The Supreme Court of Illinois has ruled that it is proper for us to ask you whether you are a member of the Communist Party. You have refused to answer the question.

Mr. Anastaplo: Sir, the Supreme Court has said nothing at all about that directly. The Supreme Court talked about three areas, and it has been—

Commissioner Stephan: I mean, in *In re Anastaplo*, it so ruled.

Mr. Anastaplo: *In re Anastaplo* has been modified, not [fol. 340] only by the Supreme Court of the United States but by the Supreme Court of Illinois, in effect. And the Supreme Court order, last September, specified three areas which seemed to set some kind of bounds for these inquiries, and an attempt has been made in the course of these hearings to push these questions about affiliations, first under one and then under the other category. I think both of them are really outside the spirit as well as the letter of the Supreme Court order.

May I go on, Mr. Chairman?

Commissioner Stephan: Yes, sir, I wish you would.

Mr. Anastaplo: On, that is, to the problem of reputation, which we have not talked about much. I take it, then, that you are not prepared to stipulate that my reputation, in so far as it is relevant for character and fitness purposes, has been established adequately in the record?

Commissioner Stephan: Not at this time.

Mr. Anastaplo: Specific evidence on this issue, already in the record, includes, one, character references and affidavits I have submitted, and, two, Mr. Starrs' article, in XVIII University of Detroit Law Journal, 195, particularly at page 216 and following—

Commissioner Stephan: May I interrupt you for a moment, to just make one thing clear about our procedures? I have no right to make a ruling which would, in effect, bind other Commissioners before they have had a chance to sit down and discuss the case with their fellow Commissioners. I am not sitting as an all-powerful judge. I am more of a moderator than anything else. Each Commissioner has a perfect right to ask questions and entertain views without reference to the views I entertain.

Mr. Anastaplo: Are you suggesting, then, that all rulings—

[fol. 341] Commissioner Stephan: I cannot rule and bind every member of this Committee by ruling, and I think

you have asked me to do things which, if I acquiesced in, I would be in danger of in effect ousting the powers of the other Commissioners.

Mr. Anastaplo: I certainly do not want to—

Commissioner Stephan: That is the basis for my ruling.

Mr. Anastaplo: I certainly do not want to incite you to the usurpation of your function. But I mention a few of these because I thought some of them may be so obvious, that it may be a matter of in a few minutes taking care of it, so as to clear the record.

Commissioner Stephan: That is the reason I can't do it.

Mr. Anastaplo: I have pointed to two items that I think are relative to proper reputation. May I add that I supplied an abridged version of Mr. Starrs's article—I supplied an abridged version of that article, which would be preferable to me for the record, simply because it is more to the point and takes out the excerpts that are particularly relevant. In addition to these two items, may I refer you on this issue of reputation, which I am not sure what it really means in this case, to the discussion of my case in 50 Northwestern University Law Review, page 94, which is the March-April 1955 issue, which I previously referred to on another issue. I should like also to submit on the issue of reputation the following items.

Commissioner Weiss: Mr. Anastaplo, while you are looking for those items, I was a little bit intrigued by the remark earlier in the proceedings that you didn't care to have witnesses, which I thought you would probably bring in on the character and reputation item, and you started to explain why not, and we went off on another matter. I was just wondering whether at this moment you would have some [fol. 342] statement to make about why you do not wish to have witnesses called by you, on this subject.

Mr. Anastaplo: Well, I think certainly on the reputation item I don't need witnesses. I think that has been clearly established.

Commissioner Weiss: I didn't know but that you were interrupted in your answer. This was several weeks back.

Mr. Anastaplo: Perhaps that is an insufficient answer at that point. There were other reasons, last time, in terms of

how I would judge the bringing in of witnesses in this case at this time.

The three further items I have on the issue of reputation only, are the following: I have an article by Mr. Malcolm Sharp, entitled, "Freedom and the Free Bar," 17 Lawyers Guild Review 43, summer, I think, of '57, where he deals with my matter at page 44; and I have two short editorial articles, one from a publication called I. F. Stone's Weekly, and the other—I. F. Stone's Weekly, March 7, '55, page 3, and the other from my home town newspaper, the Carterville, Illinois, Herald, of October first, 1954.

Commissioner Stephan: Are you going to hand these up at this time?

[Mr. Anastaplo submitted the documents to Commissioner Stephan.]

Mr. Anastaplo: Yes, sir. I want to make clear to you one point about these articles, in fact about everything I have mentioned in connection with the reputation issue. Several of these articles express opinions about my affiliations and beliefs. Of course, none of these opinions were made under oath or are otherwise sworn to. I do not at this time submit these articles on the issue of affiliations, but sub- [fol. 343] mit them only on the issue of reputation. That is, these articles purport to be reactions of various people to my case during the last few years, which, I take it, has a bearing upon reputation.

Commissioner Moses: I would like to ask you upon what theory you believe this type of unsworn evidence is properly to be considered by this group of Commissioners, when, if you care to, presumably you could bring in the individuals who wrote the articles and expressed their views, and have this Committee see them and determine their credibility from their testimony.

Mr. Anastaplo: One of them has, in fact, supplied you with an affidavit, which is sworn to

Commissioner Moses: I believe Professor Sharp did.

Mr. Anastaplo: Yes, sir. One of them—

Commissioner Moses: That does not answer the question as to this document.

Mr. Anastaplo: Most of the others are absent from the city and would not otherwise be available, even if I wanted

to call them. Furthermore, I have supplied something which is sworn testimony in the affidavits and in the character references.

Commissioner Moses: They are in the record. I am talking about these documents. On what theory, on your part, are these entitled to consideration?

Mr. Anastaplo: I take it that reputation has something to do with how people regard you in the community.

Commissioner Moses: And this is evidence of reputation?

Mr. Anastaplo: Of how people regard you in the community, in publications, where they have spoken about how they regard you.

Commissioner Moses: I see.

Mr. Anastaplo: I am still not clear what reputation is [fol. 344] doing, in this particular matter. It could be that as a result of the Committee ruling and the Court's decision in 1954, my reputation would be completely destroyed. And therefore I would have no evidence to present, even though my character and fitness may be perfectly good. I mean, reputation is a very tricky sort of thing to play with, especially when there has been adverse rulings—when there have been adverse rulings before.

Commissioner Weiss: That is one reason I asked whether you didn't want to take advantage of offering witnesses who you know would probably know a great deal about you and your reputation, as favorable.

Mr. Anastaplo: In the first place, I don't see that reputation has any bearing on the issue of character and fitness.

Commissioner Carey: Reputation for what?

Mr. Anastaplo: Frankly, sir, I don't know anything more about it than you do. I just saw it in the Supreme Court order. "Reputation," is all it says.

Commissioner Carey: These articles that you are offering here, do you represent themselves being gratuitous articles by the authors?

Mr. Anastaplo: In the sense that I had nothing to do with writing them, yes, sir. Let me see. I may have seen Mr. Sharp's article before he published it; I may not. The other two, I know I didn't see until I saw them in the papers, until somebody—

Commissioner Carey: Are you personally acquainted with the author of either one of the other articles?

Mr. Anastaplo: I am personally acquainted with the author of the Carterville Herald, who in my first hearing, in 1950—

Commissioner Carey: How about the other fellow?

Mr. Anastaplo: I mean, I have seen him, that is about all. I wouldn't regard him among my personal acquaint-
[fol. 345] ances. The Carterville Herald publisher supplied one of the affidavits in 1950, for me. The article simply reflects public opinion, which, I take it, has some bearing upon reputation.

Commissioner Carey: You offer them for what they are worth?

Mr. Anastaplo: For whatever they are worth, and whatever the issue of reputation is worth, too.

Commissioner Stephan: We will take them on that basis.

Mr. Anastaplo: And I definitely do not present them as evidence as to any of the facts in them, as to whether I am this, that, or the other.

Commissioner Stephan: But you are offering these because you think they help your reputation. If you think they help your reputation, it must be because you think they are factual.

Commissioner Carey: Certainly they are not antagonistic to him, I assume; I haven't seen them.

Mr. Anastaplo: Let me say a few more words about them. They show that people who have looked at the case, have still come away and said, "He is not a scoundrel." Now, there have been adverse comments upon my case. There was one in a Washington University law quarterly, or law journal, and one in the U.C.L.A. publication. Both of these are of doubtful value, primarily because, as I read the comments, they had not really looked at the record of the case and only commented upon the Supreme Court decision, as it is given in the Supreme Court reports. I referred to various publications and several citations in my papers, however, and they are available to you.

Before I proceed—there remains, unless the Committee has further requests or questions, something which I speak of simply as tidying up.

[fol. 346] Can we arrange, first of all, that I be authorized to confer with a member of the Committee or with Mr. Cain, as soon as possible, with a view to establishing the record, making corrections, and that sort of thing? I should also like to know how extra copies of the record can be secured; is this something that can be arranged at this time?

Commissioner Stephan: Mr. Cain is absent at the moment.

Mr. Anastaplo: I don't mean the specific date, but the authority to proceed in this way.

Commissioner Stephan: I think initially you should take up corrections through Mr. Cain's office, and if he feels that there are matters that the Committee should pass upon he will be in touch with us.

Mr. Anastaplo: I now submit that all the material that I have submitted to up to this point, with the exception of the Konigsberg case record, are part of the record of this rehearing. And I have already made the suggestion that you substitute for Mr. Starrs' article the collection of excerpts therefrom, relating to my case, that I have supplied you. Let me stress again that I consider my letters to the Committee of March 3rd and March 27th, very important. I believe they should be so placed, if possible, so placed in the record that they can be read at the conclusion of the hearings that each of them follows, the hearings of February 28th and March 21st, respectively. These letters explain, correct and amplify key points in the transcripts of the two hearings. Let me also stress the important corrections to be found both in the letter of March 27th and in the transcript at pages 113 to 114, corrections for the passages at pages 49 and 63 in the transcript. It is important with respect to these two errors, particularly the one at page 63, that the Supreme Court be provided with a corrected copy of the transcript. [fol. 347] Is there any material I have that you would like to have, or any information that you would like to request?

Commissioner Young: Mr. Chairman, I have two questions and two documents which I would like to present, if I may, at this time.

Commissioner Stephan: Two questions involving two documents?

Commissioner Young: Two questions and two documents, yes.

Commissioner Stephan: All right, proceed.

Commissioner Sawyier: I think there is a pending question before the Chairman.

Commissioner Stephan: Well, he asked if we had anything more we wanted of him. Is this responsive to that question?

Commissioner Young: Yes. I have something I would like to have received in the record and marked "Young's Exhibit One."

[The document was marked "Young's Exhibit One."]

Commissioner Young: Mr. Anastaplo, I show you a document marked "Young's Exhibit One," which is an application for membership in the Illinois State Bar Association, and call your attention to the question, "Are you now or have you ever been a member of the Communist Party?" and I ask you, if you are admitted to the bar and desire to seek membership in the Illinois State Bar Association, whether or not you would answer that question.

Mr. Anastaplo: First I would make a distinction, at least a formal distinction between a state agency such as this Committee and an as yet unofficial agency or association such as the Illinois Bar Association. I would further say, however, that my inclination would be not to answer [fol. 348] such questions, and I would endeavor as one of my first efforts as a member of the bar to have such questions stricken from applications. I realize, of course, that both the Illinois Bar Association and The Chicago Bar Association might not be inclined to regard too much my own opinions on this matter, if and when I should be a lawyer.

Commissioner Young: You do recognize, of course, that there are something over ten thousand lawyers in Illinois belonging to the Illinois State Bar Association who do consider that question a proper question?

Mr. Anastaplo: At least they acquiesce, sir. I should think that makes even more important the contribution I can make.

Commissioner Young: And you would refuse to answer that question?

Mr. Anastaplo: Probably.

Commissioner Young: I show you now another document marked "Young's Exhibit Two"—

[The document was marked "Young's Exhibit Two."]

Commissioner Young: —which is an application for membership in The Chicago Bar Association, and I call your attention to this question, "I am not now, nor have I ever been affiliated with any group which to my knowledge has or had as a part of its program the domination or overthrow of the government of the United States by force or any other illegal means; nor have I ever advocated such a program." Would you answer that question, in making application for membership in The Chicago Bar Association?

Mr. Anastaplo: I think I would probably be inclined to oppose such questions. Let me also add, sir, I don't see it on here, is there any provision for any kind of attesting—any kind of swearing or affirmation with respect to either [fol. 349] of these applications?

Commissioner Young: No, there is not.

Mr. Anastaplo: Then this is not considered, neither of these applications are considered judicial proceedings?

Commissioner Young: No, sir.

Mr. Anastaplo: You have no sanctions at all if a man signs either of these statements?

Commissioner Young: No, none whatever.

Mr. Anastaplo: According to you, then, it is utterly valueless.

Commissioner Young: No, I am asking you whether or not you would sign—answer such a question.

Mr. Anastaplo: I would be inclined to resist them on principle, but I would like to ask—I would like to say it seems to me, on the basis of your position, they would be worthless statements.

Commissioner Moses: The sanction would be expulsion from the Association if it turned out to be false pretenses.

Mr. Anastaplo: But there would be no other risk run, except possible expulsion later?

Commissioner Moses: Except, of course, the injury to one's reputation.

Mr. Anastaplo: Except, of course, the way one would be regarded by his colleagues in the bar. Let me also add that I would be inclined, pending further research, to suggest that both of these statements might be in some ways unconstitutional. If it could be established, and it may not be possible to establish it, that both the Chicago and Illinois Bar Associations in some ways partake of or serve in ways that make them similar to official bodies—that is to say, if either of these associations enjoy privileges [fol. 350] or have powers under the state constitution or according to state law, then both of these may face the same constitutional objections that I have heretofore referred to.

Commissioner Young: You understand, of course, that The Chicago Bar Association has something over—

Commissioner Weiss: Seventy-three hundred members.

Commissioner Young: —seventy-three hundred members, and that the membership of The Chicago Bar Association thinks that this is an important question.

Mr. Anastaplo: Evidently—I am not—I wouldn't say the membership thinks it. I suspect much of the membership has not thought about it. I would say that whoever put it on the question blank thought it, and perhaps the Board of Managers or whoever you have as a ruling body, thought so when they approved it. The fact that you have an overruling endorsement of it, tacitly or explicitly, is not determinative. I would say it is in a way too bad, and I think that simply emphasizes the value of my position.

Commissioner Young: You distinguish between answering those two questions and answering questions put to you by Mayor Daley if you were invited to become a member of the judiciary?

Mr. Anastaplo: As I said earlier, if I were asked by Mayor Daley to become a member of his slate, I might end up answering questions about religion and politics of the most sweeping kind. You can't tell, I might simply say, "No," to those, too, but I can see a distinction between those. I think that these two bar associations may

so partake of official bodies that such questions are improper under the Constitution. Let me also add that if an integrated bar should develop, as it has in some states, those questions would clearly be improper. Right now I [fol. 351] would simply say that I would have to do some work on it before I would be sure whether they are legally or constitutionally proper.

Commissioner Weiss: Mr. Chairman—

Commissioner Stephan: To get an answer to this question we may have to put you on the bench before we put you in the bar.

Mr. Anastaplo: I anticipate neither.

Commissioner Weiss: Mr. Chairman, in the cleaning up process, as Mr. Anastaplo describes the remainder of his remarks, I wanted to make sure that we aren't just sloughing off this question of reputation. In the Supreme Court's order it said, "Additional questions presented"—this is after they cite the case, your case, and so forth, "concerning applicant's activities since his original application was denied, and his present reputation"—"his present reputation." Then they go on to say, "We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so and to report the evidence and its conclusions." And my question is, to Mr. Anastaplo, whether he is satisfied that he has carried the burden of presenting his present reputation as used in the Supreme Court's order.

Mr. Anastaplo: I believe so. Let me also note that, so far as I remember now, I am the first one that mentioned reputation.

Commissioner Weiss: No, the Court did.

Mr. Anastaplo: Since the Court order, in the course of these hearings, which would suggest that it doesn't seem to be very prominent in the minds of the Committee.

Commissioner Weiss: That is not quite accurate, because, if you recall, at the end of several hearings I asked you if you had any witnesses you were going to bring in, not only I, but various other Commissioners, the thought [fol. 352] being, with the thought in mind that there may be witnesses with respect to your present reputation.

Mr. Anastaplo: Oh, I see. I'm sorry. I don't recall that. I would also add that I think reputation has been adequately established, and furthermore, I simply do not see that it is really a critical issue, simply because this Committee and the Court may have simply ruined my reputation in '54. It has nothing to do with my character and fitness.

Commissioner Weiss: Well, my only point is, Mr. Anastaplo, that the Court's order is the Court's order, and we took it literally, and I assumed you would.

Commissioner Stephan: The supplementary questionnaire and the letters of recommendation you submitted were following the Court's order, were they not? They certainly bear, to some degree, at least, on your reputation.

Mr. Anastaplo: Yes, they do. And, in a way, they are sufficient. I mean, I have not provided more, since then.

Commissioner Stephan: I wouldn't want you to think we have disregarded them, because we haven't.

Mr. Anastaplo: I assume that I will receive copies of transcript of this hearing and that of May 19th, as well as any reports prepared by you for the Court. Is that correct?

Commissioner Stephan: Yes.

Mr. Anastaplo: Can you give me some idea of how this Committee plans to proceed, and of your anticipated time limit?

Commissioner Stephan: You understand if there is favorable action on your application, there is no report to the Supreme Court other than the fact of your certification. There will not be a report to the Supreme Court, likewise, unless—off the record, one minute.

[fol. 353] Commissioner Moses: In any event, Mr. Chairman, I would like to suggest that the question was, if there is a report, will he receive a copy. You didn't commit the Committee, one way or the other.

Commissioner Stephan: If there is a report filed with the Court, there will be a copy made available to you, yes.

Commissioner Moses: That answers your question.

Commissioner Stephan: The only confusion here is as to just when a report is required, and in looking at the Court's order to see if in any event we submit a report.

Mr. Anastaplo: I take it that the Court's order has been included in the record someplace.

Commissioner Stephan: The order of the Court seems clear, that we are to make a report in any event.

Commissioner Weiss: Yes, that is my interpretation. That's what I was trying to get at.

Mr. Anastaplo: May I suggest one thing. When you relay the record to the Court, I suggest that it be put together in a chronological order. The reason I suggest that is that, the last time, it was put together in just the opposite order, and it may have led to some confusion and error.

Commissioner Stephan: Do you mean to have the exhibits presented at each hearing, in its chronological sequence?

Mr. Anastaplo: That may be a difficult problem.

Commissioner Stephan: I think it might be.

Mr. Anastaplo: I am talking about the transcripts themselves. They were presented backwards, last time, and that raised a problem, I mean, for the reader reading it for the first time.

Commissioner Stephan: We will start with page one.

Commissioner Rothschild: Mr. Chairman, there is a point I wanted to make, and I think it should be made on the [fol. 354] record. Mr. Anastaplo, in his criticism of the Committee, in the first hearing, has suggested that a report was not available to him at the time he filed his application to the Court for review of the original action. And I just think the record should show that our normal proceedings are such that no report as to an applicant for review is made by this Committee until after the applicant files his petition with the Court. That is the normal proceeding. However, to the extent that we modify it here on account of the Court order, I still think the record should show that his proceeding in the original proceedings, at least, as to the Court procedure, was normal, at least under our rules.

Mr. Anastaplo: Yes, and that emphasizes to me the absolute unfairness of the rules, that an applicant has to argue about why he has been excluded, before he knows what the reasons are.

Commissioner Rothschild: That may come under due process, not under equal protection [which would mean] that you got something different than someone else.

Mr. Anastaplo: Everybody gets the same treatment?

Commissioner Rothschild: That is right.

Commissioner Stephan: In any event, that isn't the problem here and now.

Mr. Anastaplo: That is really emphasizing the importance of analyzing these other cases. Perhaps you can't say anything about this, but if an adverse report is prepared for the Court, will it be possible for me to see it about the same time that the Court does, in order that I might make any submission to the Court that I then deem necessary, for its consideration before it acts upon the report?

Commissioner Stephan: I think we will file it with the Court and be guided by what the Court directs us to do.

Mr. Anastaplo: Is there anything else I should know at this time about Committee procedure, or about sub-[fol. 355] sequent matters involved in the procedure? In particular I should like to know whether there is any other evidence, favorable or unfavorable, that the Committee may have received or may know of, which is not already in the record and known to me?

Commissioner Carey: Which is not already in the record and known to you?

Commissioner Stephan: Aren't those two things synonymous?

Mr. Anastaplo: They may be in the record without my knowing about it.

Commissioner Stephan: There is nothing in the record that you don't know about.

Mr. Anastaplo: May I also have the Committee—I think this is possible—may I have the Committee stipulate that this is the first rehearing since the decision on my original application in June, 1951? That is to say, I am now exercising the first of my rights to rehearings provided for by the Committee rules.

Commissioner Stephan: This is the first rehearing, yes.

Commissioner Young: Wasn't there other rehearings, arlier?

Commissioner Thomas: Did you apply for a rehearing, earlier?

Mr. Anastaplo: Well, now, I was coming to the basis for that. The 1954 Committee report recognized at page 11 that there had been up to that time no petition for rehearing.

Commissioner Moses: Mr. Chairman, I suggest, in respect to this matter, the record speaks for itself. This hearing is held pursuant to an order of the Supreme Court, and the record shows as to whether there had been previous applications for rehearing or not—the record shows.

[fol. 356] Commissioner Stephan: I want to be fair to you. What is the point of the question?

Mr. Anastaplo: I simply want to have one place in the record where, if the occasion later arises, you can point to and say, "This has been the first rehearing since 1950," and therefore if you have occasion to try to establish it and to inquire into it—

Commissioner Sawyier: Is that so?

Commissioner Moses: The fact is obvious, Mr. Anastaplo, that the members of this Committee feel—

Mr. Anastaplo: Let me say why I say this, though. There had been none before '54, as the Committee report indicated, and there have been none since '54, but there has been one inquiry by me, as to whether there would be any purpose to a rehearing toward the end of 1955, I believe.

Commissioner Stephan: That did not constitute a rehearing. This is the only rehearing.

Mr. Anastaplo: Then I will withdraw, and it is dropped —so far as I am concerned.

Commissioner Weiss: That will all be a part of this record, anyway, all your correspondence.

Mr. Anastaplo: May I be permitted to tell one story?

Commissioner Moses: Well, is it all right to tell in front of the reporter?

Mr. Anastaplo: It is all right to tell in front of the reporter.

Commissioner Stephan: I assume it has something to do with your character and fitness.

Mr. Anastaplo: It has something to do with my character and fitness. It also has something to do with Mr.

[fol. 357] Young's earlier comment about the overwhelming support of these questions on the Illinois State Bar Association's forms about affiliations, and so forth.

Commissioner Stephan: Proceed.

Mr. Anastaplo: It also points to the value of my position. Of course, it speaks also to the Committee's position. The silence of the Committee members during the course of this encounter, silence seen throughout these hearings and broken only by approving rather than disapproving remarks about particular lines of inquiry—the silence which was put in terms of reserving judgment—reminds me of the story that made the rounds after the famous secret speech which Nikita Khrushchev made in Moscow, the speech in which he bitterly denounced Joseph Stalin's record. After Comrade Khrushchev had appalled his audience on the extent of his denunciation of the dead Comrade Stalin, he entertained written questions from the floor. One of the questions, which was read aloud, asked why he, Comrade Khrushchev, had not protested these things while Comrade Stalin was alive, rather than now; why he had not done something earlier to stop such terrible things. Khrushchev responded by asking who had submitted this question. There was only silence in his audience. His comment thereupon was, "There you have my answer." I suppose a more legalistically minded speaker than Khrushchev might have claimed that he was merely reserving judgment until after Stalin was dead.

I submit that in some ways, what the American bar has been doing is reserving judgment on many things that are happening, and that it would be healthier if it acted in the stages that it should.

If there are no further comments or questions, I should now like to submit my closing argument and brief, and with [fol. 358] it three sets of documents mentioned therein.

Commissioner Carey: Before you do, I should like to make the observation that, on my own part, I fail to observe the pertinency of that story.

Mr. Anastaplo: I say, sir, that one is responsible for acquiescence with, as much as he is responsible for explicit approval of, certain actions, especially when his acquiescence can lead or permit people to ask questions and follow

lines of inquiries that in themselves are prejudicial and can be very harmful.

Commissioner Carey: I still think it is very vague, but let's go on.

Mr. Anastaplo: I should also like to file a closing statement in which it is shown, among other things, just how this sort of acquiescence on the part of one of the members of the subcommittee led to the questioning that leads me here today.

Commissioner Stephan: Let me see if I can get squared away with you on time. We spoke about a two-hour session today, and it is now about two hours.

Mr. Anastaplo: It will take me about ten minutes. These supporting documents that I now submit to you are to be included in the record, if you accept them, but not in the transcript itself, because of the obvious problems of length, and so forth. I am referring to my 1954 Reply Brief in the Supreme Court of Illinois. This provides something of a comment on the 1954 Committee report, which I refer to from time to time. My 1955 United States Supreme Court papers, which are the Jurisdictional Statement and the Petition for Rehearing filed in that Court, which also are referred to in my final statement for some of the argument.

Commissioner Stephan: This is the Supreme Court of the United States?

[fol. 359] Mr. Anastaplo: Yes, sir, in 1955. An unsuccessful attempt was made to review this case. And my 1957 brief filed last summer in the Supreme Court of Illinois, and on the basis of which this rehearing was granted, to which I also refer in my closing statement.

[Mr. Anastaplo submitted the documents to Commissioner Stephan.]

Commissioner Stephan: We will accept these.

Mr. Anastaplo: The closing argument and brief that I should now like to submit to you may be conveniently divided into thirteen parts. After my introductory remarks, I propose to consider generally the record on character and fitness, and then my character references and affidavits. Thereupon, I will speak of the Declaration of Independence, first as it relates to the history of this case, then as it affects

the decision in 1954 of the Illinois Supreme Court. This will be followed by a discussion of the lack of foundation in this record for the affiliations inquiries. I propose then to make a survey of the constitutional arguments I present, before proceeding to discuss, first, the significance of the Konigsberg case record, and then the relevance to this matter of the Konigsberg decision. I should thereupon like to say a few words about the current challenge to republican government, before going on to some remarks about the American scene and about the role of the American bar in our time. After making some appropriate closing remarks, I will have done my duty and you will be left with yours.

May I lay down the same condition here as before, that the statement I now submit, which includes what would have been, first, oral argument, second, oral testimony as to facts, and, third, a written brief, be incorporated in the body of [fol. 360] the transcript itself, at this time, by being typed on stencils as my testimony has been heretofore. I should also like to request that my original be returned when the typist is finished with it, unless she has some special reason for keeping it. If there is no request, I will not read this statement or any part of it. I will transmit it to the Chairman and now offer it for inclusion in the transcript as if it had been delivered orally.

[Mr. Anastaplo submitted the document to Commissioner Stephan.]

Commissioner Stephan: We will put it in the transcript at this point.

Commissioner Weiss: As if it had been orally rendered?

Mr. Anastaplo: As if it had been orally rendered.

Commissioner Stephan: Correct. This is headed, "Closing Argument and Brief Before the Committee on Character and Fitness, May 26, 1958."

Commissioner Hastings: Show that it was not orally read.

Commissioner Stephan: Right. It consists of sixty-three pages, and will be treated as if you had actually rendered it orally.

[fol. 361] The document, consisting of 63 typewritten pages, which the reporter was instructed to incorporate in the transcript at this point, is as follows:

CLOSING ARGUMENT AND BRIEF BEFORE THE COMMITTEE ON CHARACTER AND FITNESS, May 26, 1958

1. Introduction.

I trust you will make allowances for my inexperience in these matters as I try to place, in the context of Twentieth Century America, the position I have taken and the principles I have defended before this Committee for almost a decade. If I do not speak in the manner you have come to expect from bar applicants and in closing arguments, please bear in mind the fact that occasions such as this arise very infrequently for me. I hope that what I have to say is significant enough to compensate for my inadequacies as an advocate, to compensate for the time required to speak to the many problems raised by the Committee and its conduct, those problems which I have not already handled in my analysis of the *Rockafellow* case, and to compensate as well for the unedifying and inevitably falsifying spectacle of having to talk so much about oneself.

I should like to have you bear in mind as I speak two observations from Athens of the Fifth Century before Christ, two short sentences which should illuminate what I have to say about America in the middle of the Twentieth Century. The first observation was made by Pericles, and is to be found in the famous funeral speech you have all heard of. 'For where the rewards of virtue are greatest,' he said, 'there live the worthiest men.' He had learned that a country will produce by and large the kind of men valued and rewarded by the country. My second observation was made by Socrates, who said, 'It is easy to praise Athens [fol. 362] to Athenians.' What Athens needed—what the Illinois bar needs—are men who will assume the unpopular burden of pointing out defects and offering constructive advice. You will forgive me then if I do not speak as one seeking favors from you.

NOTE: Internal references to Transcript pages refer to numbers [side folios in brackets] in original record as filed, and coincide with printed pages 2 to 313, inclusive, of this record.

2. Record on Character and Fitness.

Let me begin by reasserting that I think I have more than established my character and fitness for purposes of admission to the bar. We have a record of well over 200 pages of my testimony alone, a record containing an abundance of favorable evidence and, strange as it may seem to the careless reader, not one item of adverse evidence. My views on the right of revolution, for instance, are perfectly respectable. These views are, I insist, essentially the same as those of most members of the Committee on Character and Fitness and of the Supreme Court of Illinois. They permit no doubt at all about my willingness and ability to take the attorney's oath. I have tried to cooperate as fully as is good for both you and me. Partly because of the way this case arose, I have spoken freely about the right of revolution and the Declaration of Independence after registering without effect certain constitutional objections to such inquiry and discussion in this setting.

True, I have refused to answer certain questions—questions about possible affiliations with the Republican Party, the Ku Klux Klan, the Communist Party, the Silver Shirts of America, and the Democratic Party, as well as questions about my religious affiliations and beliefs. (Transcript, pages 43, 46, 144-145, 203-204.)* But my refusals to answer such questions neither constitute adverse evidence nor interfere with the ability and function of the Committee to appraise my character and fitness. The unanswered questions are themselves questionable under the [fol. 363] First and Fourteenth Amendments. The constitutional reasons I have given for not answering them are proper, reasonable and sincere. I have already spelled out, both in my testimony and in documents submitted to you, both the reasons for my position and the evidentiary significance of my refusals to answer in the context of the record of this matter. The various cases I have referred to—*Konigsberg, Schware, Yates, Patterson,* as well as the post-Civil-War cases of *Garland* and *Cummings*—suggest

* Internal references to Transcript pages refer to numbers [side folios in brackets] in original record as filed, and coincide with printed pages 2 to 313, inclusive, of this record.

there is considerable Supreme Court doctrine supporting my view of the Constitution.

The positive evidence in this record on my behalf is, I submit, overwhelming. This positive evidence includes a dozen current character affidavits and references gathered pursuant to the Committee's rules, all of my published writtings of the past ten years, testimony about my various activities, public and private, of recent years, my wartime military record, and an exhaustive probing of my ideas and values under the trying conditions of more than a dozen hours before this Committee. Also significant is the fact that there has not been received or turned up by this Committee one item of adverse evidence during a decade when mine has been the most publicized case before you.

Many of you—perhaps all of you—know people who know me well, both down here on LaSalle Street and out on the Midway. Even so, nothing significant against me has been unearthed. Instead, this Committee has been reduced to trying to make something out of such things as a newspaper photograph of a three-year-old girl. The concern of the Committee with such trivia, which is seen again and again in this record, is eloquent testimony to the overwhelming case that has been established in my behalf. The attempt by certain members of the Committee to find something adverse has even led to such adventures in legal [fol. 364] research as those seen in the inquiries about my religious beliefs, inquiries recklessly based on an 1856 case long since made dead law by the Illinois Constitution of 1870. The Committee on Character and Fitness made several mistakes at my expense in 1951 and 1954, mistakes that became increasingly apparent as the years wore on. You gentlemen had an opportunity, when the United States Supreme Court decisions came down a year ago, to settle this matter quickly, fairly, and without further risks either to you or to me. Instead, you have only demonstrated that you are capable of making mistakes of your very own. The reckless reliance upon the quaint *Rockafellow* case, which I analyzed earlier today, is only illustrative of the entire approach of the Committee.

In any event, aside from my refusals to answer certain questions there is nothing that an impartial and reason-

able observer, who appreciates the conditions and circumstances of our six sessions together, would consider unfavorable evidence. And I further submit, my refusals on principle to answer certain questions, about political and religious affiliations and opinions, may some day be recognized as the most favorable evidence you have ever had from any applicant appearing before you for admission to the bar.

3. Character references and affidavits.

Perhaps I should say a few words at this point about the dozen or so character references and affidavits that have been submitted to you. I have said that a *prima facie* case was established on my behalf before these hearings started. I know of nothing that has happened since to challenge that *prima facie* case. That case was established, in part, by the character appraisals submitted directly to the Committee by citizens for whose names the Committee had asked me and with whom the Committee corresponded [fol. 365] directly. There have been, in addition, the character affidavits I was asked to secure from others myself and to relay to the Committee in accordance with your rules.

I have also said that the Committee must take far more seriously than it has ever seemed disposed to do the testimony of these men if it respects its procedures and values its standards. Yet, not a word was said about such evidence in the 1954 Report of this Committee, if I remember correctly; hardly a word has been said during the course of these hearings about such evidence. Permit me to say something now *only* about the character appraisals sent directly to the Committee at the request of the Committee. These appraisals were made by outstanding and conscientious Americans who have known about me for some time and who have known also about my difficulties securing admission to the bar. Nevertheless, they have made the highly favorable appraisals of me that you have seen, even though not one of them would agree fully with everything I have said or done. One or two, perhaps more, of them, in fact, would probably on the basis of prudential con-

siderations counsel complete submission to this Committee in this matter. Yet all of them have set aside differences of opinion they might have with me to supply you the valuations of my character and fitness you requested of them.

I have faced one self-imposed difficulty in nominating the dozen or so men who have submitted evidence on my behalf. I resolved to call only upon men who were not vulnerable, vulnerable in the sense that they might some day be discriminated against because I had drawn them into my case. On this basis, all resident aliens, who are dependent on good relations with the State Department, were ruled out by me, as well as teachers and others who were not clearly protected either by their publicly-recognized religious or other connections or by their careers [fol. 366] and reputations from the kinds of charges that might come from having been associated in any way with my case.

Even with these limitations, however, I suggest that you have been privileged to receive the advice and evidence of a number of distinguished Americans, the testimony of any one of which would be sufficient for me to offset rumors I might had heard reflecting upon a third person's character and fitness. In my matter, of course, you do not have even rumors to concern yourselves with.

Let me identify further the men with whom you communicated directly, drawing only upon information that is of a public nature.

(1) Alexander Meiklejohn is professor emeritus of the University of Wisconsin. He was once President of Amherst College. He is, as some of you may know, regarded as the dean of American educators. A full-length story about Mr. Meiklejohn was printed last summer in the New York *Times Sunday Magazine* on the occasion of, I believe, his eighty-fifth birthday. The American Association of University Professors announced at that time that it had established an annual award, to be called the Alexander Meiklejohn Medal for Academic Freedom.

(2) Richard Weaver of the University of Chicago faculty is an author of several books and magazine articles,

He is a contributor to *The National Review* and is one of the editorial advisors of the new journal entitled, *Modern Age, A Conservative Review.*

(3) Malcolm Sharp you have all heard of, both as a professor of law and as a conscientious and responsible advocate at the bar. Those of you who have had dealings with him, either as students in his Contracts Course or as colleagues in the law, will know what I mean when I say [fol. 367] he is a gentleman in the old-fashioned sense, one of a breed that is likely to become extinct in our time. I should acknowledge that Mr. Sharp has been my most thoughtful and consequently most valuable supporter throughout all these years, even though he began by disagreeing with the position I was taking before this Committee and urging me to abandon it. This early advice was based, in part, upon his sense of duty as a teacher toward a young student about to be deprived of his career at the bar.

(4) Roscoe Steffen you also know as a man with a national reputation both as a law professor at Yale and Chicago and as an advocate for the Department of Justice before the Supreme Court of the United States.

(5) Yves Simon, formerly of Notre Dame, is currently at the University of Chicago. Professor Simon, whose works include a book on the philosophy of democratic government, received from the American Catholic Philosophical Association last month the Spellman-Aquinas Medal for Excellence in Philosophy.

These, then, are some of the people who have testified in my behalf. You have received, in addition, the evidence of several others, who include two men who are prominent in local Democratic political circles, one man who is a close associate of mine of many years as a fellow employee, one who is a lawyer and former chairman of this Committee, one who is a lawyer, an author of a text on the canons of ethics, who has distinguished himself by his work on an important Chicago Bar Association committee, and one who is a minister with the highest reputation for his work both in academic and labor union circles.

I hope I have not done or said anything during the course of these hearings that would make such men think

their confidence had been misplaced. I submit that these [fol. 368] testimonials, even if they stood alone, are enough, in these circumstances, not only to support but even to require the finding, under the rules and standards of this Committee as well as under the Constitution of the United States, that my character and fitness are adequate for admission to the bar. If men of this calibre are not trusted and strongly relied upon when they testify about someone they know and about someone against whom nothing unfavorable is known, then there is called into question the very purpose and good faith of this Committee.

4. The Declaration of Independence and the history of this case.

I should like to remind you again that basic to this case is the issue whether an applicant who defends the Declaration of Independence is eligible for admission to the bar. It is only because such a defence has been attempted by me that inquiries have been made about membership in organizations such as the Ku Klux Klan, the Communist Party, the Silver Shirts of America, and more recently, the Republican Party and the Democratic Party. For the benefit of those who have not had an opportunity to follow my suggestion that you read the opening pages of the transcript of my first hearing before any section of this Committee, November 10, 1950, I should like to describe in detail the crucial sequence of inquiries at that first hearing. So far as I know, the sub-committee members—Mr. John E. Baker, Jr. and Mr. Stephen A. Mitchell—knew nothing adverse or suspicious about me. (In fact, nothing adverse or suspicious has been since turned up or pointed to at any time during all these years, as the Committee chairman conceded in effect during our meeting of May 19.)

The very first question recorded in the transcript—this is at page 15 of the Record I submitted to the Supreme [fol. 369] Court of the United States in January 1953—the very first question, a question which was put to many other applicants at the time I was being processed for admission to the bar, was the question with which Commissioner Mitchell greeted me,

'Have you an opinion as to whether or not a member of the Communist Party would be eligible to take the oath of office of a lawyer in the State of Illinois, honestly, and be admitted as a lawyer?'

This, I say, was the opening question. Up to this point I was indistinguishable from the hundreds of other applicants who were admitted to the bar in November 1950. Like the hundreds of others, I too had an opinion on the problem posed by the commissioner. But unlike the others, I had the 'wrong' opinion. Commissioner Mitchell proceeded to follow up my 'wrong' answer—for I had answered that it seemed to me that Communist Party affiliation was not *per se* disqualifying—he proceeded to follow up with a question, as I understood it, about whether the Communist belief in revolution did not disqualify Communist applicants. I answered—we are still on page 15, the very first page of the transcript of my first encounter with this Committee—I answered,

'I think it is a fundamental principle in American political history and in American ideology or creed that the overthrow of a government after it has been unsatisfactory—after an attempt has been made to get rid of it by other methods—that the overthrow of such government is possible and sometimes desirable.'

(I am relying here on my version of the transcript, which incorporates a couple of corrections accepted by the Committee.) My position, you see, was that a belief in the right of revolution did not disqualify an applicant for admission to the bar. Thus, I did not see that the commissioner's stated reason was enough to disqualify a Communist.

The next three pages of the transcript record an argument between the commissioners and me about the right of [fol. 370] revolution. I insisted that a belief in the right of revolution was perfectly legitimate; they argued warmly against it. That is to say, they must have lost control of themselves—for I am sure they believe in the right of revolution as much as you and I do. It must be that they

were not used to hearing such things from bar applicants. The excitement of the Korean War, which was then in a critical state, might have had a bearing on their conduct. Not inconsequential, I suspect, was the fact that Mr. Mitchell, who was already a prominent local Democrat and who was to become Democratic National Committee Chairman two years later, was a member of a political party that had been recklessly charged with virtual treason. I do not remember whether Senator McCarthy's 'twenty years of treason' slander had yet been promulgated, but the idea was going around. Too many good Democrats were determined, consciously or unconsciously, to show they could be as tough on Communists and Communist ideas as those rascally Republicans. Unfortunately for the cause of constitutional government in Illinois, the two character commissioners were not adequately informed about what constituted Communist or suspicious ideas. Certainly, the right of revolution came long before either Karl Marx or the Communist Party. It is, of course, embodied most eloquently for us in the Declaration of Independence.

Commissioner Mitchell may not have intended to let the discussion go as far as it did. I base this concession in part on my own observation of his reaction when his partner made the fatal leap, and in part on a report in Mr. Love's memorandum to the Illinois Supreme Court to the effect that one of the commissioners in the subcommittee had later expressed doubts to the full committee about the propriety of the affiliations questions. But once the leap had been made, neither commissioner was able to back down. To be perfectly fair, I must also make the conces- [fol. 371] sion that they might have thought that I would surely back down and thereby save them from losing face. They might have acted differently if they had at once realized that a career at the bar was being unjustly sacrificed to their pride.

As I was saying, the first four pages or so of the transcript of that first session of November 10, 1950 report an argument between the commissioners and me about the right of revolution. Nothing I said about that right, even in the subsequent session, of January 5, 1951, when I put it emphatically in terms of the Declaration of In-

dependence, pleased them. (You may wonder, as I did and do, what this had to do with my character and fitness—but there it was.) Then there came what I have called the 'fatal leap.' Permit me to read the transcript at this crucial point—it is at page 18 of my United States Supreme Court Record, on the fourth page of the transcript of the November 10 meeting. We are continuing here the right of revolution discussion carried on since the first page of the transcript:

'*Commissioner Mitchell*: I will ask you in detail. You believe that assuming the government should be overthrown, in your opinion, that you and others of like mind would be justified in raising a company of men with military equipment and proceed to take over the government of the United States, of the state of Illinois. By shaking your head do you mean yes?

'*Mr. Anastaplo*: If you get to the point where overthrow is necessary, then overthrow is justified. It just means that you overthrow the government by force.

'*Commissioner Mitchell*: And would that also include in your mind justification for putting a spy into the administrative department, one or another of the administrative departments of the United States or the government of the State of Illinois.

'*Mr. Anastaplo*: If you get to the point you think the government should be overthrown, I think that would be a legitimate means.

'*Commissioner Mitchell*: There isn't any difference in your mind in the propriety of using a gun or using a spy?

[fol. 372] '*Mr. Anastaplo*: I think spies have been used in quite honorable causes.

'*Commissioner Mitchell*: Your answer is, you do think so?

'*Mr. Anastaplo*: Yes.

'*Commissioner Baker*: Let me ask you a question. Are you aware of the fact that the Department of Justice has a list of what are described as subversive organizations?

'*Mr. Anastaplo*: Yes.

'*Commissioner Baker*: Have you ever seen that list?

'*Mr. Anastaplo*: Yes.

'*Commissioner Baker*: Are you a member of any organization that is listed on the Attorney General's list, to your knowledge. (No answer) Just to keep you from having to work so hard mentally on it, what organizations—give me all the organizations you are affiliated with or are a member of. (No answer) That oughtn't to be too hard.

'*Mr. Anastaplo*: Do you believe that is a legitimate question?

'*Mr. Baker*: Yes, I do. We are inquiring into not only your character, but your fitness, under Rule 58. We don't compel you to answer it. Are you a member of the Communist Party?'

And thus the leap was made. Thus far, no Committee has had the courage to make the leap back, even when justice required such a retreat. You have heard how this case developed and what the foundation was and still is for the Communist Party question. So far as I know—and this is a challenge I have laid down several times without official refutation—so far as I know, there was no special reason for asking me even about my views about the qualifications of Communists to practice law. Others were asked the same question. But in my hearing, this led to the right of revolution and this, in turn, as you have just heard, led to inquiries about my affiliations which I have yet to answer.

One of the commissioners, I say in explanation, not in justification, was taken somewhat aback by developments. [fol. 373] At least I am willing to give him credit for that much, even though it would have been more fitting of him to disavow completely an approach that led to such radical results. If some of you are inclined to regard too harshly the acquiescence of Commissioner Mitchell, I urge you to reflect upon the highly improper line of inquiry about God and religious beliefs that Mr. Young was permitted to pursue at our April 23 meeting without protest or opposition from a dozen of you. I submit that Commissioners Mitchell and Baker had little more to support their approach than, as we have seen, Commissioners Young and Moses have to support theirs. And, in effect, this Committee is in the posi-

tion that Mr. Mitchell was in, unable to make the leap back that is necessary in the interest of justice and good faith.

We see in this excerpt from the opening pages of my first appearance before this Committee on November 10, 1950, a confirmation of Edmund Burke's warning that the intrusion of theoretical inquiries into political matters is liable to have an unsettling and inflammatory effect. This is one of the reasons why questions about such matters as an applicant's theoretical views about political and religious matters should be scrupulously avoided by this Committee. Such questions are rarely likely to bear upon character and fitness problems; but they are very likely to lead to conflict and injustice if the applicant is so foolish as to defend his ideas.

Your chairman has indicated on a couple of occasions that the questions in this rehearing about affiliations, particularly about possible Communist Party membership, are justified in the first instance by the history of the case. (See Transcript pages 117-118, 148-150.) I agree with him that the history of the case is important, but the history [fol. 374] properly understood. The sequence I have just reported to you in some detail is important for a proper understanding of that history. We are all here today because I understood the Declaration of Independence better than did the gentlemen who were commissioned to pass upon my character and fitness but who found other pursuits too tempting to resist.

5. The Declaration of Independence and the 1954 Illinois Supreme Court opinion.

What I have been saying disagrees, of course, with the crucial passage in the 1954 opinion of the Supreme Court of Illinois, where it is reported, at 3 Ill. 2d, pages 473-474:

> 'Looking to the record, to the committee report to this court, and to petitioner's brief, we find that the crux of the controversy is centered upon petitioner's refusal to answer as to whether he was a member of the Communist Party or of any of the subversive organizations on the list compiled by the United States Department of Justice. When first asked if he was a member of

the Communist Party petitioner responded that the question was an inquiry into his political beliefs and an "illegitimate question." Similar responses to similar questions appear in other portions of the record of petitioner's examination and at no time did he answer the question. Predicated upon these refusals, [underscoring added] the committee, on the basis of their opinion that a member of the Communist Party, because of such membership, might not be able in good faith to take the oath of lawyer to support the constitution of the United States and the constitution of the State of Illinois, then directed questions to petitioner designed to elicit his views in what the committee felt were pertinent areas of inquiry. Briefly summarized, as the result of the committee's questioning, petitioner expressed his opinion that a member of the Communist Party, otherwise qualified, should be admitted to the practice of law and that he could see nothing contradictory or incompatible between adherence to the tenets of that party and the taking of the oath to support the constitutions. Likewise, at this time, he expressed his belief in the doctrine of revolution and the overthrow of government by force of arms, saying that he would embrace such doctrine if he could not agree with the existing government, or found it unsatisfactory, and felt that force of arms was the only means to attain the end desired. He stated that such view would not be altered even though the existing government provided for peaceful and orderly means of change . . .'

This is, to say the least, an inadequate presentation of my [fol. 375] views about the right to revolution. Cognizance should have been taken of the comment at page 6 of my Reply Brief filed in the Supreme Court of Illinois May 6, 1954:

'If the Applicant has been unduly discursive and philosophical in trying to make plain his views on "the right of revolution," he respectfully refers the Committee and the Court to the Declaration of Independence.'

I do not believe any more need be said at this point about the right of revolution, if only because that doctrine, insofar as it was a spectre, has been finally laid to rest in the course of these hearings.

It is obvious, as pointed out in 50 *Northwestern University Law Review*, page 95, note 6, that the Court's account of the sequence of questions does not conform to the facts which I have already laid before you. I would be remiss in my duty if I did not insist upon this claim. On the other hand, I have no interest either in sleight-of-hand manipulation of the record or in irresponsible charges that I cannot substantiate. You have heard the evidence upon which my criticism of the Court's account is based. The Chairman observed at our meeting of April 23 (page 224 of the Transcript),

> 'You must make the assumption that the seven Justices did not look at the record, if the mistake is so glaring.'

True enough, the mistake is glaring. You can see that for yourselves. But you will pardon me if I refrain from adopting the Chairman's suggestion about the Court not reading the record.

After all, the Court did assure us it had looked at the record, at the committee report and at my brief. I assure you they did not get these mistaken ideas from either the record or from my brief. In fact, I had even warned the Court, at page 40 of my long 1953 brief, against what the Committee might do:

> 'We should consider a little more fully at this point [fol. 376] the part played by the discussion of the "right of revolution" in this matter. As time goes by, members of the Committee will no doubt realize that certain ideas which had shocked them so at one time are quite respectable and honorable ideas and consequently nothing to get excited about. Even now, the Committee may not be willing to acknowledge that if it had not been for the Applicant's opinions about the "right of revolution", there would not have been the decision to deny him admission to the Bar. But to bury this vital fact is to avoid completely a realistic consideration of this matter.'

There is only one other source by which the Court, by its own account, could have been misled, and that is the report of this Committee in 1954. And indeed, it is there that we find the burial of vital facts against which I had unsuccessfully warned the Court.

The Committee wrote a short report of fifteen pages or so. The first six pages are largely inconsequential. But at pages 7 through 10, we find excerpts from the transcripts. These excerpts are grouped under three headings, in this order,

> '1) Questions as to applicant's membership in the Communist Party, which applicant characterized as "illegitimate" and refused to answer.
>
> '2) Questions dealing with the possible inconsistency between membership in the Communist Party and subscribing to the oath.
>
> '3) Questions dealing generally with the right of revolution, to which applicant gave extended and discursive philosophical responses.'

(I might note in passing that although my answers about revolution might have been 'extended and discursive', the excerpts selected by the Committee to illustrate my answers have more than half the lines devoted to extended Committee questions.)

Here you have a clue to the cause of the Court's vital and glaring mistake: the Committee had arranged the excerpts in a misleading order, and in fact in the very order which the Court subsequently adopted in the passage from its opinion that I have read you. This misleading sequence [fol. 377] is emphasized again in the Committee's discussion of these excerpts, at pages 13 through 15, where the questions about affiliations are discussed first, the questions about the eligibility of Communists are discussed next, and then the questions about the right of revolution. Everything about the 1954 Report reinforces the impression that this is the correct sequence of inquiries, even the fact of such comments as this, at page 13,

'In his first oral examination by a section of the Committee, the applicant was asked if he was a member of the Communist Party . . .'

Nowhere else, if I remember correctly, is either of the other two sets of questions connected explicitly with the first oral examination.

The importance of the sequence of questions is acknowledged for those who know the facts by the refusal of the Committee to grant or even mention the claim I had made in my brief about the correct sequence. And it is acknowledged by the fact that this Committee has not simply agreed up to this point that I am right on that issue and thereupon argued that it makes no difference. It does make a difference, of course. It is a decisive clue, for instance, as to what this case is really all about. In fact, I am so bold as to claim that whatever the internal validity of the Court's 1954 opinion may be in the *Anastaplo* case, 3 Ill. 2d 471, it has nothing to do with the case of George Anastaplo as it then was and as it still is. Related to this observation is a comment upon the handling of the record by the Committee that I made in my May 1954 Reply Brief to the Court, just a few days before my oral argument (pages 1-2):

'We should like, however, to make a few comments on the selection made by the Committee of the grounds for its decision. We say "selection", because it is ob- [fol. 378] vious that the Committee has chosen, in effect, to disavow much of what it has done and said at the various Hearings with the Applicant. Such a course of action, involving an unrealistic attempt to ignore much of the proceedings and to avoid the significance of the order of the questions asked in the hearings, was predicted. [Citing brief.] The Committee seems to overlook the fact that its Report, limited as it now is, contributes considerably to a vindication of the Applicant's position.'

I am submitting this Reply Brief of eight pages as a commentary upon the Committee Report of 1954. My earnest hope is, of course, that there should not be a repetition in

your forthcoming report to the Supreme Court of the tactics employed in 1954.

Some might conclude that my fundamental mistake in this matter was to underestimate how much reliance the Court would be obliged to place upon the Committee judgment and report. The Supreme Court of Illinois is, as you know, extremely busy. Furthermore, it must appreciate the efforts of the character committees throughout the state, particularly the committee in Chicago with its very heavy load. But, if I might presume to advise you, the Court's great reliance upon character committees should stimulate you to the highest degree of scrupulousness in your reports, out of self-respect as gentlemen and lawyers if not out of a concern to be more than fair to a particular applicant.

In some ways, the Committee Report of 1954 is even more irresponsible and unfair than the improper use we saw of the *Rockafellow* case in our April 23 meeting. It is a very short report, signed by the seventeen members of the Committee, presumably after consultation and careful study. I do not care to say how much, if any, of the misrepresentation and inadequacy of the Report is due to incompetency, how much to deliberation, and how much to accident. I do know that it struck me at the time and strikes me still as eminently unfair. I suggest for instance that I [fol. 379] handled the Committee's position much more fairly in my papers than the Committee handled my position in its report. Perhaps the most disturbing aspect of the matter is that in the four years since this decision was rendered, even after I had commented upon it, the Committee has not taken the trouble on its own motion to inform the Court of the vital error which it had made. As a member of a character committee, I assure you I could not have accepted an apparent judicial vindication that rested on such an unsure and unfair foundation. Even as an applicant, and not a member of a character committee, I do not want to be admitted by the Court to the bar by means of any misrepresentation of what I have said and done before you. As I have said, I have no use for sleight-of-hand tactics.

May I return now to the central issue, as I see it? It is, I maintain, only because a defence of the Declaration of

Independence has been attempted by me that inquiries have been made about membership in organizations such as the Ku Klux Klan, the Communist Party, the Silver Shirts of America, and more recently, the Republican Party and the Democratic Party. Let me remind you also that there is not the slightest evidence of any of t[illegible] memberships in the record. There is, instead, the testi[illegible]y I was forced by Committee methods to introduce February 28 about what a member of the Supreme Court of Illinois said to me about one of these organizations, 'No one ever thought you were a Communist.' The Chairman's stipulation at our meeting of May 19 acknowledges, in effect, that the Supreme Court Justice knew what he was talking about—I am referring to the stipulation in which the Chairman says, after consultation with the Committee in closed session,

> '. . . . And in that connection, I will tell you this: that no one has stated [orally or in writing] to this Committee that you are or have ever been a Communist [fol. 380] or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the organizations or any of the organizations listed as subversive by the Attorney General's list . . . '

Can it be claimed in good faith that my refusals to answer questions about the Ku Klux Klan, the Communist Party, and the Silver Shirts of America prevent you from passing on my character and fitness? Such a claim, in this context, would be inappropriate and unfair with respect to my character and fitness. The great king, Croesus, when about to attack the Persian Empire, was reassured by the oracle, 'If you attack the Persians, you will destroy a mighty empire.' It was only after his own empire went down in ruins at the hands of the Persians that Croesus realized the claim of the oracle had really been directed at him.

6. Lack of foundation for the affiliations inquiries.

This extended discussion of the relation of the Declaration of Independence to the questions about Communist, Ku Klux Klan and other affiliations points up as well the

lack of foundation for any of the inquiries by the Committee about any of my affiliations. This lack of foundation has serious implications under the Fourteenth Amendment, with respect to both freedom of speech and due process of law, just as do the questions themselves which were and continue to be a kind of penalty for the views I expressed about the right of revolution and the Declaration of Independence. Some foundation must be laid for such inquiries —that is a bare minimum necessary to sustain them. There is nothing in the questionnaire or other forms of the Committee, nothing in the rules of the Committee or of the Court to call for or require such questions. There is nothing in my ideas or conduct to make such questions particularly appropriate in my matter. And, I suggest, a [fol. 381] foundation and justification for such novel inquiries are particularly desirable and necessary when the inquiries stray off into the constitutionally-vital areas of political and religious opinions and associations. May I remind you of Commissioner Christianson's reference at our April 23 meeting (at page 221 of the Transcript) to the problem of homosexuality and admission to the bar. Let us assume for the moment something that would require careful analysis and a long argument—let us assume that homosexuals should be excluded from the bar. Notice how Mr. Christianson put his problem to me:

> 'Assume that a member of the committee, with absolutely no background information or material, and actuated only by his non-expert observance of the applicant, is concerned as to whether or not an applicant is a homosexual, and asks a question, this simple question, of the applicant, "Are you a homosexual?" Does the applicant have the right to refuse to answer this question, and if so, on what basis?'

Let me call special attention to the almost matter-of-fact reference by the commissioner to the assumption that he had observed homosexual tendencies or manifestations in the applicant before him. Whether he realized it or not, the lawyer in him, the craftsman who intuitively grasps how things like this are done in court in accordance with due process requirements—the lawyer in him tried to lay a

foundation, however inadequate it might be in this example, a foundation for the inquiry about homosexuality. No such foundation has been laid in this case for the inquiries about my affiliations. (It would be hard to imagine what could serve as a foundation for questions with respect to both the Ku Klux Klan and the Communist Party.) In fact, no attempt has really been made to justify my special treatment—unless you point of course to the legitimate ideas I have expressed upon request about the Declaration of Independence. These ideas were certainly the cause of the [fol. 382] affiliations inquiries, but they provide instead of a constitutionally-valid foundation rock for such inquiries nothing but sand into which these inquiries must sink and disappear. Once again, I am reminded of the prophecy, 'If you attack the Persians, you will destroy a mighty empire.'

7. Survey of constitutional arguments.

A careless reader of this record might conclude that I have practically answered some of the questions about affiliations that you insist upon. But you and I know that I have drawn a line past which I will not go. In this I have remained constant for almost a decade. Although I am willing, partly because of the way the case first started, to waive constitutional rights and discuss my views about the right of revolution, I am not willing to testify, directly or indirectly, about possible Communist or other affiliations of a political or religious nature. This means, in this context, I should also refuse to answer questions about distinctly Communist doctrines. You understand, I hope, that I continue to adhere to the principle that one should not be required, in circumstances such as these, to indicate directly or indirectly membership or non-membership in political, quasi-political, or religious organizations. This does not mean, of course, that I as a citizen do not have the right and duty to oppose in a constitutional manner various organizations on the political scene.

Even if I am wrong about what the Federal Constitution says, even if the Supreme Court of the United States is wrong in the opinions it has delivered on this subject during the last year or so, even if it is fitting and proper to

eliminate or exclude from the bar members of the Ku Klux Klan, the Communist Party, and the Silver Shirts of America, I submit I still have established my character [fol. 383] and fitness for bar admission purposes. I should like in this connection to refer you to two analyses I have made, starting from your assumptions about the law and about the nature of these organizations. First, there is the logical analysis presented at our meeting of April 23, which is to be found at pages 191-201 of the Transcript. The power of this analysis is increased even more by the stipulation of the Chairman made May 19, to which I have already referred. Second, there are the Remarks prepared for submission to you at the beginning of our meeting of April 7. Common sense, which is addressed in both these analyses, dictates that I have clearly established my case; the Federal Constitution requires you to recognize and accept this dictate of reason. As Mr. Justice Frankfurter said in a concurring opinion in the *Schware* case,

> 'A refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause.'

I say I have established my case ~~even~~ it is assumed that the Committee is correct in its claim that it has a right to make and to insist upon all the inquiries it makes and even if it is assumed that the Supreme Court of the United States is wrong on these issues. Even against the background of these assumptions, my character and fitness for bar admission purposes has been established. Whatever our differences of opinion, the Committee must realize this.

But I should also like to add that I do not believe, as the Committee seems to believe, that the Supreme Court of the United States was in fact mistaken in its interpretation of the First and Fourteenth Amendments in the *Konigsberg, Schware, Patterson, Sweezy,* and *Yates* cases, to say nothing of the classic decision of *West Virginia Board of* [fol. 384] *Education* v. *Barnette*. I reaffirm my position, therefore, that to deny me admission to the bar on the basis of this record is to violate constitutional principles relating to freedom of speech, freedom of religion, due process of

law, and the equal protection of the laws, and perhaps also those principles incorporated in the *ex post facto* and bill of attainder clauses of the Federal Constitution. A detailed application of these federal constitutional principles to this matter may be found in the Transcript of this Rehearing at pages 35, 38-39, 42, 43, 65, 92-97, 99-103, 106, 119-122, 154-157, 172-173, 185, 190, 191-201, as well as in the papers I filed in the Supreme Court of the United States January 11, 1955 and March 23, 1955 in my unsuccessful attempt to have the opinion of the Supreme Court of Illinois reviewed. (Jurisdictional Statement, January 11, 1955, pages 5-8, 8-17, 22-40; Petition for Rehearing, March 23, 1955, pages 2-11.) I should now like to submit for your consideration these two 1955 papers.

It is, I suggest, appropriate to consider at this time these 1955 papers since most of the issues discussed therein have been raised again in the course of this rehearing. My due process discussion is strengthened by the deliberate disregard by this Committee of the implicit restrictions laid down by the Supreme Court of Illinois in its order of September 17, 1957, by the disregard of Rule 9 of the Committee Rules specifying the subjects of inquiry, and by the repeated refusals of this Committee to warn and advise me of the areas to be explored from meeting to meeting. And, of course, due process is vitally affected by the showing I have made about the purposelessness and irrelevance in this case of the questions about affiliations, particularly the questions about the Communist Party.

[fol. 385] I need only remind you that the Committee chose not to make a request for the information and document I described at the first meeting on February 28 of this year, information which casts grave doubt upon the good faith and the appropriateness of the questions about Communist Party affiliations. If I remember correctly, no one, at the time I announced my willingness to hand over the relevant document to you if I should receive a formal request for it from the Committee or any member thereof, a request which never came—no one at that time challenged the correctness of the information given me by an unnamed and still anonymous member of the Illinois Court that handed down the 1954 decision in my case. No one chal-

lenged or doubted the information contained in that one crucial sentence, 'No one ever thought you were a Communist.' I am not saying I am or am not a Communist. But I do wonder with what right you might still claim that you must have me answer that question in order to be able to pass upon my character and fitness. Perhaps you will want to study with care those parts of the record dealing with this episode, an episode in which I let myself be advised and guided with respect to both propriety and relevance by this character committee. May I refer you to pages 46-47, 49-59, 61-63 and 113-115 of the Transcript as well as to my letter to you of March 3. (My letter of March 27 corrects an error in the Transcript and makes it clear that the anonymity of the Court member is preserved. Anonymous informers are, of course, justly rejected by the law. But there are special circumstances here, which I describe at page 187 of the Transcript:

> '. . . there is a special relationship between this committee here, and the Court. The member of the Court who made the statement knows he made it; the committee that heard the statement knows the member of the Court who made the statement will read this record.')

[fol. 386] It should be noted again, as I did at page 187, that the purpose of the statement was not to serve as testimony or evidence as to my affiliations or lack of them—on that issue I do not speak—but rather to speak to the problem of the foundation or justification or purpose of these questions in this context. The Chairman is correct when he says, also at page 187,

> 'Well, I was under the impression that you had adverted to that alleged statement by a Supreme Court member, not for the purpose of showing one way or another about your possible communist affiliation, but rather that this committee was not acting in good faith in pursuing the point.'

Now we have the Chairman's stipulation of May 19 to back up the claim of the Supreme Court Justice, the stipu-

lation by the Chairman on behalf of the Committee in which he said,

> 'And in that connection, I will tell you this: that no one has stated [orally or in writing] to this Committee that you are or have ever been a Communist, or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the organizations or any of the organizations listed as subversive by the Attorney General's list.'

I submit to you, gentlemen, that all this evidence, evidence as to what you know and believe, repudiates once and for all the rationalization that has made the Committee's position respectable all these years. However this case may eventually be disposed of, all reasonable men will know that this repudiation is conclusive. It is fortunate that the Illinois bar has nothing to lose by your concession of this point. Rather, as I shall later demonstrate, the Illinois bar cannot but be elevated by such concessions.

8. Significance of the Konigsberg record.

My 1955 United States Supreme Court papers which I have submitted are of further value to you in that they present the kind of arguments that won the approval of the Supreme Court when it finally decided to review my kind of case. I am referring, of course, to the *Konigsberg* [fol. 387] case, 353 U.S. 252, which is certainly no stronger than mine on the fundamental issues. I have remarked several times during the course of our meetings that the *Konigsberg* decision is the one the United States Supreme Court would have handed down if they had chosen to review my matter when I gave them an opportunity to do so. This Committee should recognize this obvious fact rather than try to distinguish the cases, especially when there is not one item of adverse evidence in the record to stimulate you to find some way to get around the law. May I point out that the State Bar and the Bar Examiners of California did recognize the relation between the two cases when they closed their December 1955 brief before the Supreme Court of the United States, a brief in opposition to the petition for a writ of certiorari.

Respondents, they say at page 23,

> 'Wish to direct particular attention to this Court's very recent decision in *Re George Anastaplo*. The factual backgrounds of the Anastaplo and Konigsberg cases are very similar.'

(May I note in passing that we see here too the widespread but mistaken impression that a refusal of the United States Supreme Court to review a case is, in the ordinary sense, a review, or even a 'decision.' After comparing the two cases, the California authorities end their brief (at page 24) with the conclusion,

> 'Respondents submit that petitioner [Mr. Konigsberg] has, at the most, done no more than re-present the issues raised in *Re George Anastaplo* and there determined by this Court not to present a substantial federal question.'

The California authorities were right in their claim that the *Konigsberg* case was no better than mine—in fact, it seems to me obviously weaker in many respects. If you have had an opportunity to look through the record, which I have secured from a local library and which I have left with your Chairman, you have seen what I mean. For one [Vol. 388] thing, there was in the *Konigsberg* record independent evidence from a shaky witness who testified before the character committee and who was cross-examined by the applicant's counsel, evidence that the applicant had been a fellow-participant a decade before at Communist Party cell meetings. But even with such evidence in the record, evidence which is prejudicial to an applicant in times such as these even if it should not be, the Supreme Court of the United States reversed the California ruling. The decisions in the *Schware* and *Patterson* cases, both of which also involve bar admission matters, serve to reinforce this Supreme Court ruling. Although the Oregon court still refuses to follow the Supreme Court's lead in the *Patterson* case, it implicitly recognizes at 318 P. 2d 912 that the *Konigsberg* decision would govern the *Anastaplo* case as

well, even as the *Anastaplo* case is presented in the 1954 opinion of the misled Illinois Court.

The complaint and argument of the California authorities that I have described to you received special attention in the petitioner's response to the California bar's brief. The applicant's counsel insists, in a section entitled, 'This Case Is Distinguishable from the Anastaplo Case', that their analysis plus the total record

> 'makes abundantly evident, that there are fundamental differences between the facts and the issues raised herein and in the Anastaplo case—particularly petitioner's strong affirmative proof of faith in democratic principles and opposition to use of force and violence in our democratic system.' (pages 16-17)

I do not wish to be drawn into an argument about whose attachment to democratic principles is stronger. Besides, I am more inclined to regard my principles as republican rather than democratic. I suppose the reference to the 'strong affirmative proof' is to the forty or more affidavits {fol. 389} that Mr. Konigsberg submitted after the controversy with the character committee began. I must again admit I have always found uncongenial the submission of any affidavits at all, and, but for the rules of this Committee, I would have been inclined to submit this case upon my application and the testimony I have given. That, I believe, is all the affirmative case I need: The dozen affidavits I was required by Committee rules to submit in 1950, and the second dozen at this time, serve to reinforce the affirmative case otherwise made. Since the Committee requires these affidavits, however, I suggest that they are bound to take them very seriously. In fact, the affidavits standing alone establish an affirmative case. In any event, I believe we have more than enough 'strong affirmative proof' in our record.

The second point of distinction referred to by Mr. Konigsberg's counsel is that their client had submitted strong affirmative proof of 'opposition to use of force and violence in our democratic system.' There is, indeed, something to this claim. It is only fair for me to admit that Mr. Konigsberg was able to give the California authorities as-

surances that I am not able to give to you. At page 29 of the Supreme Court Record, the applicant tells the Committee;

> 'I can say very definitely I did not, I don't, I never would advocate the overthrow of the government by force or violence clearly and unequivocably.'

At page 37 and at other points in the Record, this assurance is repeated,

> 'I never did, I do not and I never would advocate the overthrow of the government by force or violence.'

There is certainly this difference between the two cases. I cannot give you such assurances, if only because I am obliged to make an explicit defense of the Declaration of [fol. 390] Independence. Republican government is stronger, it seems to me, when a responsible revolutionary principle is recognized. May I repeat the exuberant sentiment expressed by James Wilson, a member of the Constitutional Convention—the sentiment expressed by a Justice of the Supreme Court of the United States in the presence and with the approval of President George Washington,

> '. . . the principles of our constitutions and governments and laws are materially *better* than the principles of the constitution and government and laws of England. Permit me to mention one great principle, the *vital* principle I may well call it, which diffuses animation and vigor through all the others. The principle I mean is this, that the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient.'

Further on, in this same Introductory Lecture on Law delivered at Philadelphia in 1790, Mr. Justice Wilson proclaims,

> '. . . a revolution principle certainly is, and certainly should be taught as a principle of the constitution of the United States, and of every State in the Union.

> This revolution principle—that, the sovereign power residing in the people, they may change their constitution and government whenever they please—is not a principle of discord, rancor, or war; it is a principle of melioration, contentment, and peace. It is a principle recommended by happy experience. To the testimony of Pennsylvania—to the testimony of the United States I appeal for the truth of what I say.'

Compare to these forthright statements, statements made by and to men who were not afraid of principles and ideas—compare to these statements the quibbling and devious refinements we have had about the resistance one might dare put up in the event of certain remote tyrannical developments. The air should be cleared: boldness, not pettiness, becomes us. Let us not disgrace our heritage and demean ourselves in the eyes of posterity.

If you must distinguish the *Konigsberg* and *Anastaplo* cases, must not your distinction rest precisely on this point, [fol. 391] on the fact that I insist upon defending the Declaration of Independence? This would, of course, confirm the observation I have made before, the observation that it was only because I defended the Declaration of Independence that this case ever developed in the first place. I submit, however, that my understanding of the Declaration of Independence and the right of revolution, an understanding reflected in the various excerpts from Abraham Lincoln, Thomas Aquinas and Daniel Webster I supplied you during our April 7 meeting, is an understanding well worth defending. That understanding is incorporated in a statement submitted to you last June, when I said,

> 'Almost everyone would agree there are times when a government should be overthrown by force. Ultimately, a citizen has to decide for himself when such a time comes—when the principles of The Declaration of Independence apply. The conscientious citizen reserves the right and duty to judge his government even as he takes the oath to support not that government but the Constitution. In fact, our Constitution can be said to have this right implicit in it, a right that protects the Constitution itself from subversion by a government

> that may be constitutional only in appearance. But, as I said when I first appeared before the full Committee on January 5, 1951, I do not think anyone would be justified at a time such as this, when the normal processes of government permit reasonable and peaceful change, to participate in action leading to the overthrow of government.
>
> 'The right of revolution, as I understand it, is something that probably all the members of the Committee on Character and Fitness and of the Supreme Court of Illinois believe in. The Committee must realize that I would be no less reluctant than they to see this right of revolution exercised except in the most extreme circumstances. I trust that my position, and what I have contributed to its defence, indicate an abiding commitment to constitutional government.'

. an anyone but a pacifist or an irresponsible legalist take issue with this position?

I believe the Supreme Court of the United States made [fol. 392] a mistake, not in its decision in the *Konigsberg* case but in its refusal, over the protests of Mr. Justice Black and Mr. Justice Douglas, to review my case. I cannot be certain that this delay has been harmful for me, however disadvantageous and expensive it may have been. I have had an opportunity I might not otherwise have felt free to take, an opportunity to make an extended visit abroad and to spend three years in intensive graduate studies. But the delay was certainly harmful for the Supreme Court of the United States, to say nothing of the health and reputation of the Illinois bar. One of the key decisions that has led to the Congressional furor against the Court, a furor emanating from the same quarter that a generation ago had opposed President Roosevelt's court-packing scheme, was the *Konigsberg* decision.

This was in great part due to the fact that there is prejudicial material in the record, material that probably has no bearing on the issue of Mr. Konigsberg's character and fitness but only on the irrelevant issue of his political judgment, but it is nevertheless material that inevitably excites the unreflecting reader (both in and out of Congress) to

attack the Supreme Court as sympathetic to subversion. Those of you who have looked through the *Konigsberg* record know what I mean. There does not happen to be such material in my record—there is none now; there was none in 1955 when the Court was offered my case for review. Instead we even have the already-quoted stipulation by the Chairman of May 19, a stipulation explicitly denying the existence of such prejudicial material in our record.

I suspect that my record makes it much more difficult to ignore the fact that basic to this issue, both in my case and perhaps in the *Konigsberg* case as well, is a vital principle [fol. 393] and not really the problem of subversion. I trust that at least Justices Black and Douglas, who registered their willingness to review my case in 1955, saw the point of the observation I made in my Jurisdictional Statement of January 11, 1955,

> 'It is suggested that this Court may not soon have another opportunity to curb "loyalty" enthusiasts among the bar where it can act in a situation in which it is so obvious that no possible harm can come to the bar of a particular state if this Court should cause appellant's rights to be upheld. As has been said before, not even the court below or its committee can have any real doubt about appellant's qualifications for admission to the Illinois bar.'

By short-sightedly refusing to take advantage of the opportunity I presented to them, the Supreme Court of the United States imprudently invited unnecessary controversy and attack and thereby may have weakened somewhat the cause of judicial review. But, on the other hand, one might argue, by acting on the case they finally decided to accept, a case with a number of items of evidence popularly considered adverse in the record, the Supreme Court made even stronger the general argument against the activities we have seen the California and Illinois bars engage in. That argument is decisive in this matter unless you choose to penalize even further an applicant whose principal defect seems to be a willingness to defend publicly the Declaration of Independence.

To the testimony of Illinois—to the testimony of the United States I appeal for the truth of what I say.

9. Relevance of the Konigsberg decision.

Now, I should like to say a few words about the *Konigsberg* opinion itself, an opinion which in effect gives official support to the arguments I present in my Supreme Court [fol. 394] papers of January 11, and March 23, 1955. I have already discussed that opinion somewhat in the brief filed last summer in the Supreme Court of Illinois when I was trying to get this rehearing activated. I should now like to submit that brief for your consideration, along with the 1955 papers already referred to, as part of my closing argument and brief on the law relating to this matter. I have, of course, also referred to the *Konigsberg* opinion, and its application to my case, several times throughout these hearings.

May I now read to you one passage from the *Konigsberg* opinion that is particularly appropriate here. This passage is to be found in the opinion of the Court, at 353 U.S. 270,

> 'The State argues that Konigsberg's refusal to tell the Examiners whether he was a member of the Communist Party or whether he had associated with persons who were members of that party or groups which were allegedly Communist dominated tends to support an inference that he is a member of the Communist Party and therefore a person of bad moral character. We find it unnecessary to decide if Konigsberg's constitutional objections to the Committee's questions were well founded. Prior discussions by this Court indicate that his claim that the questions were improper was not frivolous' [—and here the Court cites, among other cases, *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642—] 'and we find nothing in the record which indicates that his position was not taken in good faith. Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or his moral character in general if his refusal to answer was based on a belief that the United States Constitution prohibited the type of inquiries

which the Committee was making.' [—and here the Court cites, among other cases, *In re Holland*, 377 Ill. 346.]

Thus you see here two aspects of the arguments I have been making all along. The first aspect is seen in the reference to the *Holland* case which incorporates the better Illinois rule, a rule which says in effect that the exercise of a constitutional privilege is not damaging to lawyers in bar matters. This rule was implicitly questioned [fol. 395] by the Supreme Court of Illinois in its decision in my case in 1954. But it is the *Holland* rule that the Supreme Court of the United States now says is the law of the land, even in bar admission matters. (May I refer you, in this connection, to an article in the Spring 1957 issue of the *University of Chicago Law Review* where there is to be found a discussion of the consequences of exercising the privilege against self-incrimination. An analysis of the problem for bar hearings is to be found at 24 *University of Chicago Law Review* 508. I should think a reliance upon the First Amendment should be protected as much as reliance on the Fifth.)

The *Konigsberg* opinion, reinforced by the subsequent *Patterson* decision, 353 U.S. 952, seems to justify the conclusion that my refusals to answer certain questions for the constitutional and other reasons given should have no adverse bearing on my application, especially when the record is, as in this case, otherwise favorable. I myself am inclined to believe that certain refusals are in themselves really favorable evidence, as illustrated by the incident of the religious-beliefs inquiries about which I have already spoken. (Transcript, pages 205-217.) I should also like to remind you again of Mr. John Starrs's article in Volume 18 of *The University of Detroit Law Journal*, especially Note 57. This article, by the chairman of a character committee in a neighboring state, and the other law review articles referred to in my papers, provide you with the reactions of various reasonable and responsible men to this case.

The second aspect of the argument I have been making is reflected in the reference by the Supreme Court of the

United States, both in the *Schware* opinion, at 353 U.S. 244, and in the *Konigsberg* opinion, in the excerpt I have [fol. 396] just read to you, to the celebrated passage from the *Barnette* case, 319 U.S. 624, 642,

> 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodoxy in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.'

It is partly on such principles that I base my refusals to answer questions put to me by this Committee, questions about politics and religion.

To the extent that the *Konigsberg* case does not say even more about the *Barnette* case—to the extent that it finds it 'unnecessary to decide if Konigsberg's constitutional objections to the Committee's questions were well founded'—to that extent the *Konigsberg* decision stops short of what is needed to require a thorough reform of bar admission practices. I suppose the Supreme Court will not find it necessary to pass upon the validity of such objections until a known and admitted Communist applies for admission to the bar of a state. Until then, the Court seems to say, a principled refusal to answer such questions is not enough to justify one's exclusion from the privileges of an American citizen, including the right to practice law. Still, I ultimately rest my own legal position on that 'fixed star in our constitutional constellation' which the *Barnette* case describes. Ultimately, I would say, you have no business asking the questions about politics and religion that you ask.

Two observations by Edmund Burke, made in the course of a letter urging the lifting of political restrictions upon Roman Catholics in Ireland, emphasize both the social and private benefits to be derived from such a policy as that expressed in the *Barnette* case. Burke argues at one point in this letter of 1792 that,

> 'an exclusion from the privileges of British subjects [fol. 397] is not a cure for so terrible a distemper of the human mind, as they [who exclude] are pleased

to suppose in their countrymen [who are excluded]. I rather conceive a participation in those privileges to be itself a remedy for some mental disorders.'

From your point of view, what Burke says about Roman Catholics in the Eighteenth Century should apply as well to Communists in the Twentieth. Burke solemnly warns his reader at another point,

'Our constitution is not made for great, general, and proscriptive exclusions; sooner or later it will destroy them, or they will destroy the constitution.'

I see my own defense of constitutional principles the past eight years as one law student's attempt to do what little he can to prevent the destruction of the Constitution.

Nevertheless, certain members of the Committee seem to make the suggestion from time to time that I might not abide by judicial decisions in the ordinary course of events. Related to this is the complaint that I might not be realistic in predicting what courts might do. I submit, however, I have been surprisingly realistic, considering what I have had at stake. The *Konigsberg* and *Schware* cases are what I expected from the Supreme Court when they got around to acting on these matters. I can only hope that my earlier case helped alert them to the general problem.

As for my willingness to abide by judicial decisions, the fact of the matter is that I have fully done so in the only instance when I was put to the test on this issue. When the Supreme Court of Illinois refused to reverse your decision in 1954, I accepted their ruling after learning that a review would not be forthcoming in Washington. This Springfield ruling said, in effect,

'Either you do what the character committee wants or you do not practice law.'

I chose not to practice law. You did not see me disregard-[fol. 398] ing the court which laid down for me in this matter the ruling law of the land by proceeding to set up practice anyway or otherwise trying to avoid the application of that decision. In fact, when friends or acquaint-

ances come to me with a problem of law, which of course happens from time to time, I am careful to speak only as a layman and to refer them to attorneys I know for a legal opinion.

But, may I suggest, the Committee which has permitted the expression of doubts about my willingness to abide by the law of the land has itself taken advantage of those decisions it agrees with while disregarding for the most part those decisions with which it disagrees but which happen to be most relevant and authoritative. I request, therefore, that you accept the rulings of the Supreme Court of the United States in the *Konigsberg* and *Schware* cases, which say in effect,

> 'Either you behave as we have said the Constitution demands, or you must get out of the character and fitness business.'

I respect the right of any of you to disagree with these or any other Supreme Court decisions. The Court is not infallible. But the rule of law requires that your disagreement be limited to your private, not to your official capacities, especially since you are part of the judicial branch of the government. I suggest furthermore that I have set for you to follow an example of how to abide by the law of the land, even when you fundamentally disagree with it. Moreover, I urge you to recognize the merits of that law as it now stands.

I believe, in fact, that a Committee on Character and Fitness should, as an example to all of us, be obliged not only to abide by the law of the land but to be particularly scrupulous and eager to do so. I submit to you that the law of the land requires a ruling in my favor in this matter. [fol. 399] I further submit to you that the law of the land rules out as inappropriate or irrelevant in this matter all inquiries about affiliations, about political or religious ideas, and perhaps even about the right of revolution. I am even so bold as to submit that the law of the land makes ultimately unimportant for a decision upon my character and fitness almost everything in the record that comes after page 33 in the Transcript. (It is at page 34 that the inquiries about my political affiliations and opinions be-

gin.) In fact, pages 34-360 should be seen as support for the proposition that my character and fitness have been more than adequately established by my application and character appraisals. I find support for this conclusion in the curious reply by the Chairman to my request that questions about the Communist Party be ruled out, when he said this would 'simply abort the purpose of the hearing.' (Transcript, page 126.) If this were the purpose of the hearing, then the Committee should have been satisfied with its own stipulation of May 19, a stipulation that could have been made at our first session of February 28;

> '. . . no one has stated [orally or in writing] to this Committee that you are or have ever been a Communist or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the organizations or any of the organizations listed as subversive by the Attorney General's list.'

No one claims I am a Communist or a member of the Ku Klux Klan. No one claims I am a cannibal. Yet questions about Communism have been insisted upon, whereas questions about cannibalism are ignored (even though I indicated at one point in the record, Transcript, page 140, that the case against cannibalism would have to be thought through). What justification is there in this record—that is, what foundation is there—for an insistence upon the questions about affiliations? There is only one answer possible, but one the Committee cannot make: the applicant's [fol. 400] stubborn defense of the Declaration of Independence.

I should add that much of the transcript is devoted to an examination of my opinions on a variety of matters, opinions which have little if any bearing on my character and fitness, regardless of the soundness of those opinions. Aside from the light they cast on my willingness and ability to resist unconstitutional usurpations—and for this they *are* important—, the last three hundred pages of the transcript testimony, which are devoted for the most part to my political and religious opinions and affiliations, are inappropriate for a bar admission inquiry. This, I respectfully suggest, is what a scrupulous and eager sub-

mission to the rule of law should lead you to conclude in recommending me for admission to the bar.

I believe I have now, in my various arguments up to this point, disposed of all serious or even halfway serious objections and complaints that have been implicit in what anyone has said, in the course of these six hearings, about my ideas, tactics or conduct. I trust you will let me know if there is anything I have overlooked or if there is any problem I have not spoken to that you think might be decisive or significant.

10. History, principles and republican government.

Let us set aside for the moment the constitutional principles about which I have spoken at length and take up the basic issues that give those principles life and particular relevance today. It is because of these issues that I am obliged not to waive the appropriate constitutional principles in this case. In other cases, in other circumstances, perhaps they should be waived, as Thomas Aquinas counsels us to do, because of the consequences and the effect on the public good. Under present circumstances, [fol. 401] however, I am bound to acknowledge that it is better for our country—not only for members of the Communist Party and the Ku Klux Klan and the Silver Shirts of America but for all of us—if certain methods are challenged, if certain official activities are resisted by an ordinary citizen.

Do we not all like to think we would have had the courage and the wisdom to resist the attacks upon Roman Catholics in England from the time of the Spanish Armada until the middle of the last century? May I remind you again that the questions that have been put to me about my beliefs in God are but one step away, and in excited times only a short step away, from questions about the kind of God one believes in, questions with which English Catholics were confronted by ignorant and frightened government officials who were determined to stamp out the subversive influence of an international papist conspiracy. I respectfully suggest that the men among us who would have defended the rights of Roman Catholics in Seventeenth Century England are those who defend the rights.

of Senator McCarthy and of Communists in Twentieth Century America.

Do we not all like to think we would have had the courage and wisdom to resist the attacks upon Protestants and other heretics in Spain during the Inquisition and upon the Jews in Germany during Hitler's regime? Do we not like to think we would have spoken against Pilate and for Socrates in Jerusalem and Athens? Do we not like to think we would have had the courage and wisdom to resist the attacks upon Germans in Wisconsin during the First World War, upon Japanese in California during the Second World War, and upon Negroes in the South at this time?

But why defend these people—Catholics and heretics, Jews and Jesus, Socrates and Germans, Japanese and [fol. 402] Negroes? They should have been defended not only because justice required it in each of these cases, but also because in each of these cases, the attacks that were made and the methods that were used corrupted the society making the attacks as much, if not more than they hurt those attacked. In short, gentlemen, I am acting on your behalf, not mine—and those of you who cannot realize this simply do not understand history and what can happen when misguided or evil men come along to exploit precedents left by decent men such as you.

Already, we have seen that your willingness to acquiesce in questions about the Ku Klux Klan and the Communist Party has led you to acquiesce in questions about the Republican Party, the Democratic Party, and my religious beliefs. On this record, the questions about the Communist Party have the same status as questions about the Republican Party. That is to say, you have as much reason to ask about the former as about the latter; you have heard from me the same objections to the latter as to the former. (Transcript, pages 203-204.) This Committee, and the members thereof, are on this record no more opposed to questions about the Republican Party and God than to questions about the Communist Party and the Silver Shirts of America. I put it to you who have disapproved of any of the questions asked me: is not the fact you have been trapped into acquiescing in such improper questions all

the more reason that questions of this kind should be stopped at their very beginnings?

Although members of this Committee have many times endorsed each other's questions, there is not in this record one instance of a Committee member disassociating himself from any question. This cannot be explained simply in terms of 'reserving judgment'—one can reserve judgment [fol. 403] until the damage is done. You have imposed upon me, and me alone, the burden and risk of deciding what the Committee takes seriously and what is only a temporary amusement. Yet I say this is your cause, not mine, your cause not only as Jews, Catholics, heretics and Negroes, but your cause as Americans interested in a stronger republic. You can hurt only yourselves, not me, by excluding me from the bar.

No, aside from the effect of your decisions on my livelihood and reputation, both of which are ultimately unimportant, you cannot hurt me. The American bar needs me far more than I need the American bar. Frankly, I am far from certain that it is ultimately in my interest to be admitted to the bar. But I *am* certain that it is in the interest of the bar that I should insist upon my right to be admitted on the terms set forth. It is, then, the American bar, not my own interests, that I am concerned about. I see the bar as a learned profession that has forgotten basic principles, that denies its own nature, that mistakes conscientious opposition for suspicious tactics. In short, the bar has forgotten both its learning and that it professes.

I am not here to beg, plead, or supplicate about my admission to the bar. I am here to get only what is due me. I am here to challenge you, to challenge you to live up to the finest traditions of the bar. I challenge you to take pride in the fact that the State of Illinois did produce, in a time of war excitement and misguided patriotism, one applicant who tried to preserve the honor of Lincoln's bar and to remind you of what is best in our tradition.

Even if I should do nothing else the rest of my life but join your ranks and serve as an ordinary lawyer, I have contributed this public service to our bar and country. [fol. 404] It may be, in fact, that my effectiveness at the

bar would be severely limited anyway, even if I am now admitted on your recommendation, unless the Supreme Court of Illinois in admitting me should spread on the record a public acknowledgment of my contribution. Even so, I do not deny that this case has been of great value for me. Not only have I been able to learn for myself what the nature and virtue of various procedural and substantive safeguards are, constitutional safeguards that have been violated at random in this case, but I have also been given an opportunity to make a contribution to the bar that none of my classmates have yet made—a contribution which I may never have had the opportunity to make otherwise.

Considerations such as those I have referred to give life and meaning to the sometimes-dry constitutional principles I have invoked, principles relating to freedom of speech and religion, to due process of law and the equal protection of the laws. These are considerations that reinforce and inform my own inclinations with respect to the kind of stance I will take. I have, you must know, certain ideas—aside from all constitutional, legal and political considerations—certain ideas about what it is fitting and proper for a man to do and not do in circumstances such as those in which I have found myself.

Perhaps the best guide to my notions of what it is seemly for a man to do in bar admission circumstances is to be found at 24 *New Zealand Law Journal* 231, in an article entitled, 'The Strange Case of Sir William Fox.' The Fox case serves also to indicate to us how much deterioration in manners and style we have come to accept as inevitable. Indeed, the case can be called 'strange' by this generation, or to use the term of the Chairman, 'quixotic.'

[fol. 405] Still, a superficial glance at the incident may be instructive. In November 1842 there arrived at Wellington, New Zealand a Mr. William Fox, described as 'of the Inner Temple, Barrister-at-law.' He was accompanied by his wife. At this time, the new colonist was thirty years of age. He proposed to spend the rest of his life in New Zealand. In April 1843, Mr. Fox appeared before the Chief Justice, gave evidence of his being an English barrister, and requested that he might be enrolled. He was told

by the Chief Justice that he must make the following declaration, as a condition of his admission to the New Zealand bar.

> 'I have not since my leaving England done any act whereby I should be precluded from practising as such barrister-at-law.'

This, of course, is trivial compared to the extensive questionnaires filled out by applicants for the bar of our day. But when Mr. Fox was asked to make this declaration, he replied,

> 'I would not make it, on the ground that it was derogatory to the character of the English bar to suppose such a declaration necessary.'

Quixotic? Perhaps, but a welcome contrast to much in our lives which is petty, ignoble and self-serving. Mr. Fox, in a later statement, made other arguments, some of which are not without relevance to our situation:

> '1. The declaration is one which ought not to be tendered to any person filling the station of a gentleman. It requires him to say in substance, "I am not the disreputable person you think it probable that I may be;" and it presupposes a strong likelihood that the body to which the individual belongs would be guilty of frequent disreputable acts. In no position of life, civil or military, has any English gentleman as far as I can learn, ever been required to make such a declaration.
>
> '2. It can answer no good purpose. The man who would commit acts of such a nature as ought to prevent his practising at the bar would seldom hesitate to deny that he had committed them; or by some verbal [fol. 406] subterfuge or mental reservation he would evade the difficulty. If it be said that any inquiry into the previous life of an applicant would be considered tyrannical, if made without his concurrence, but that by making this declaration he puts his previous life into your Honor's hands, I would re-

spectfully submit, that it can make no difference whether the powers to institute such enquiry be arrogated in the first instance, or whether the party is compelled to put himself into a situation in which it is constituted fair to institute it. The private circumstances of most emigrants would amount to compulsion. And, in addition to this, any enquiry subsequent to the making of such declaration, would involve the disagreeable preliminary of doubting the party's word solemnly pledged; which, I submit, would in any but the most glaring instances prove an absolute bar to such enquiry, unless it were carried on through the medium of spies and inquisitors, who I trust are not to be found among the officers of the Court.

'3. A natural consequence of the proposed course will be that men of a nice sense of honor who may object to make a declaration repugnant to their feelings will be deterred from entering the Colony, and the bar of your Honor's Court instead of being more select will be composed of the least scrupulous part of the profession, and such as necessity may compel to accede to the terms proposed to them.

'4. Supposing an applicant guilty, it is unfair and contrary to all precedent to require him to incriminate himself. If it be necessary, let the Attorney-General, or other officers to whom the duty may be assigned, make the enquiry. The character of professional men is not hid behind a screen, and oftener precedes than follows him.'

The result of all this was that one man 'of a nice sense of honor' was excluded from the New Zealand bar—excluded for twenty-five years, at which time Sir William Fox, who had in the meantime served as Attorney-General and Premier in New Zealand, was belatedly admitted to the bar on his own terms. Quixotic and unrealistic as Sir William's stand may appear to us today, is there not something in it that the American bar needs but has lost sight of? Is not our deterioration reflected in the fact that we cannot hear

without amusement and skepticism such foolish phrases as, conduct unbecoming a gentleman' and 'men of a nice [fol. 407] sense of honor'? What, in fact, *does* 'learned profession' mean?

I speak of a need to remind the bar of its traditions and to keep alive the spirit of dignified but determined advocacy and opposition. This is not only for the good of the bar, of course, but also because of what the bar means to American republican government. The bar when it exercises self-control is in a peculiar position to mediate between popular passions and informed and principled men, thereby upholding republican government. Unless there is this mediation, intelligent and responsible government is unlikely. The bar, furthermore, is in a peculiar position to apply to our daily lives the constitutional principles which nourish for this country its inner life. Unless there is this nourishment, a just and humane people is impossible. The bar is, in short, in a position to train and lead by precept and example the American people.

And, it seems to me, considerable training is in order. Something is wrong with a people that permits the self-defeating, destructive and essentially unfair repressive measures that have been taken in recent years. If I were in your position, I believe I would be most frightened by my success: It is sobering to recall that throughout the life of this case, not even a dozen of your colleagues in the bar and law schools of this state have spoken out against what this Committee has done. There has been this unlawyerlike and sometimes selfish silence despite the fact that there is a very good chance I have been right all along, even in terms of official constitutional doctrine. A lot has been forgotten, even by those who profess to be qualified to teach others. That makes it even more important that you preserve and cherish the few who do remember old-[fol. 408] fashioned, even quixotic, principles and who are willing to make sacrifices on your behalf. The one advantage over your colleagues at the bar and in the law schools which I have in this adult education enterprise is that I am in the position to say certain things that others are officially obliged to listen to, if only in the expectation that I will say something damaging or self-defeating.

We have now created a record, you and I, which makes unavoidably obvious to your colleagues at the bar, and even to those in the law schools, what should have always been apparent to them—which makes it obvious that I have been acting in their interest, not mine. They should now expect from you a return to old ideas, ideas that are 'so old that they have seemed like new.'

Permit me to give you, as a transition between what I have just been talking about and that which now follows, the following quotation from a letter by Louis D. Brandeis to a friend, a letter commenting upon the attacks that were made upon him before he was elevated to the Supreme Court of the United States:

> 'No one but a fanatic can be sure that his opinions—political, economic or social—are correct, but no man, be he reactionary or progressive, ought to doubt that free thought and free speech are necessary in a democracy; and that their exercise in things public should be encouraged. My opponents throughout long years practically refuse to discuss publicly or privately with me the measures under consideration. For opposing arguments, they substituted attacks upon reputation, and the community permitted them to do so almost without a protest. This seems to me the fundamental defect. Our task in Massachusetts is to reconstruct manhood.'

—and, may I add, this is our task in Illinois also, as well as in the country at large.

11. The American scene today.

I should like now to say a few words about the country at large, about the people which supply the bar by which [fol. 409] they are guided. They too have forgotten and they are beginning to suffer the consequences of this lapse in the national memory. One of the most sobering things I have read in recent years was an article in the October 26, 1957 issue of *The New Yorker*, an article on the behavior in Korea of American prisoners-of-war held by the Chinese. I had known there had been changes in the American tem-

per. I had seen aspects of these changes around me. I knew, for instance, that young men were unnaturally delighted to discover physical defects which would keep them out of military service. Recently I even ran into a student, a stranger to me, who was gratified he had just had his first brain seizure. As he explained, 'My draft board is breathing down my neck.'

I could not help but remember how different the atmosphere was fifteen years ago at the time of my own military service during the Second World War, when for two years —from the time I started trying to get into the Air Force (which required several attempts) until I got my wings and commission—I was permitted to escape being washed out as a flying cadet only because a series of flight surgeons were sympathetic enough to ignore weight considerations and an apparent heart condition that might have disqualified me. My zeal in that matter was not considered naive then. I suspect it would be now, if only because I also remember how widely it was accepted as sophisticated in my law school days that a young man should exploit the National Guard and thereby avoid the draft.

I much more admire a man such as Charles Summers, the conscientious objector and bar applicant whom the Chairman referred to in our meeting of April 7. (Transcript, page 151.) It seems clear on the record of his case here in Illinois that Mr. Summers is a man who had strong and de- [fol. 410] cent principles by which he stood. Such a man would have contributed much more to the Illinois bar than all those who are not bothered by the militia or any other provision in the State Constitution and who give you gentlemen the answers you like to hear when you put to them test questions of a controversial nature. Such a man as Mr. Summers is valuable to you because he does not take *the easy way out.*

I have mentioned a *New Yorker* article of last October, an article written by a correspondent who worked closely with Defense Department officials. Although that article showed me I had been right all along in my appraisal of what had been happening to the American spirit, it was still painful reading.

I can understand a young man who opposed the Korean War and who took the consequences in openly refusing to cooperate with the war effort. I can even understand the thoughtful person who decided to conceal his opposition to the war because he did not want to jeopardize a greater contribution he could make to society if attention was not drawn to him. Whatever the merits of our involvement in that war might have been, neither of these two positions involved collaboration with the enemy. But that was not the case with a large proportion of the prisoners-of-war described in this magazine article. They simply took the easy way out, or what they thought was the easy way. No one is supposed to stand by principles any more. That is out of fashion and quixotic, if not suspicious and subversive.

I was disheartened to learn from this article that about one-third—if I remember correctly—about one-third of these American prisoners collaborated one way or another with their Chinese enemy. One's politics do not enter into [fol. 411] such matters: I assume that both Communists and non-Communists could agree that a soldier should act with dignity and resolution when confronted by what he *regards* as his enemy. Discipline among the American prisoners broke down—with the result that they only harmed themselves: there was no systematic care of the sick or wounded, no systematic organization of sanitation and food supplies. (The Turkish prisoners-of-war provided a dramatic contrast.) As a result, the mortality rate among the Americans was incredibly high. (I do not believe the Turks, on the other hand, lost a single man in their stockade.) The American officers who tried to take charge were ignored, if not physically attacked by their men.

It is tempting to conclude that the Chinese and Communism were responsible for all this, through the use of the much-publicized brain-washing and other torture techniques. But to settle for that explanation would be to take the easy way out. The Defense Department, the writer reports, minimizes the role of the Chinese in this picture. True, the Chinese exploited the situation. But there was a situation to be exploited. (The Turks, on the other hand, so conducted themselves that the Chinese soon decided to leave them entirely alone. I do not praise the Turks lightly, if only

because I was raised in a household where the Greek War of Independence was as vivid and immediate as anything happening in the everyday world. It was not until I was away at school that I learned that that revolution had been fought the early part of the Nineteenth Century rather than in the days of my mother's childhood. But, let me say for the Turks that they seem to have displayed a sense of dignity and honor, an attachment to principle, and an unwillingness to take the easy way out.)

[fol. 412] It should be obvious by now that the easy way out is not as easy as it looks. It is deceptive and self-defeating, as the American prisoners-of-war found out too late. Firm principles are in part the products of unhappy experiments with easy ways—and we should accept and defend our principles even when an 'easier' way offers a tempting attraction to the ignorant and unreflecting.

The most incredible thing to me about the behavior of the American prisoners-of-war is the fact that there was not, if I recall correctly, a single successful American escape from Chinese camps, even though geographical and other such conditions were much more favorable for escape than they had been in Germany, say, during the Second World War. I am not suggesting that every prisoner-of-war should try to escape—there are temperamental differences among men that cannot be ignored. Some men, even the most courageous in battle, are simply psychologically unable to participate in an escape. Others are living and breathing escape plans from the moment they are put into a stockade.

Yet the lack of a single successful escape reveals something about the general American character. I am sure some men tried to escape, if only a few. But a successful escape from stockades within enemy territory requires not only individual initiative and courage but also good discipline among all the prisoners. The escaped prisoner must be given provisions and equipment; he must have the help of others; and, most important, he must be given time to get out of the immediate vicinity of the prison camp before his absence is detected. All these things require one essential condition: Secrecy. And secrecy in these circumstances depends on discipline—military discipline and self-dis-

[fol. 413] cipline. The shameful thing, shameful for any decent American, whether he is a Communist or a non-Communist, a member of the Ku Klux Klan or of the Republican Party—the shameful thing is that self-respect and self-restraint had so broken down among the American prisoners, among enough of them, that even the hardier souls could not act without serious risk of informers and betrayals. We see here a reflection of conditions at home where young bar applicants are, in effect, told by their elders that it is smart not to stand on principle but to give the character commissioner the answer which is safe, the answer he so obviously wants to hear. I know you are not accustomed to hear an applicant for admission speak as I speak. But please bear in mind Socrates's observation, 'It is easy to praise Athens to Athenians.'

The things I have described as happening in Korea were shameful. I recognize that national leaders were partly responsible for the misbehavior of our young men there. But that which happened in Korea is part and parcel of that which was happening at the same time here in Illinois in 1950 and since. Look at the law review article to which I have on another occasion referred you, the article by Brown and Fassett of Yale in the Spring 1953 issue of *The University of Chicago Law Review*, an article in which the Illinois bar admission situation is described. Young men, we are told, gave this character committee whatever answers seemed safest, simply because they knew what had happened in my case. I really cannot see how a committee acting in the name of character can justify an approach that almost necessarily exerts such a pernicious influence upon the characters of young men.

The peak—or should I say, the depths—of this approach was reached when classmates of mine were conveniently asked, after I had been detected,

> [fol. 414] 'Do you agree with the ideas of George Anastaplo?'

Must you not wonder why no one took up your predecessors on this challenge? But I tell you, you should be troubled by this lack of opposition, not reassured. My ideas are not as clearly wrong as all that, as the *Konigsberg* case indicates. The conduct of this Committee—this, too, I must respectfully suggest—was a denial of our country, of the

vital principles that make America distinctive. Yet this Committee could not even point to the debilitating and demoralizing effect upon a man's resistance of prison life and prison fare in a strange land among a strange people to justify this denial. I put it to you, 'Who are the true patriots?'

I should like to add a further word to my prisoners-of-war story. Naturally, the Defense Department was deeply troubled by what had happened in Korea, and so it decided to do something about it. One device hit upon is a variation of the current American remedy, the loyalty oath. I am not referring to a non-Communist oath. All American soldiers in Korea had been screened in this way before they left home, for all the good that did. (In fact, I suppose all the non-Communist oath accomplished was that a few recruits with principles were mustered out of the service early.) No, I am referring to another loyalty oath, another reliance upon a formula to be recited. This new formula is a statement of what is called the code of the soldier, a statement of how he will behave if he should be taken prisoner. The rules and regulations under which I served during the Second World War and which had been adequate for a century or so before had become outdated and had to be traded in for new models. Who knows: this code, a kind of highly advertised substitute for principles, might do some good. But I suspect it is but another symptom of our current ailment, that of taking the easy way out, of indulging ourselves.

[fol. 415] Better disciplinary training in military camps will be much more important. But even more basic would be certain changes in the American spirit, in the America from which the soldier is drawn. May I repeat my observation from Pericles, 'For where the rewards of virtue are greatest, there live the worthiest men.'

1. The role of the American bar.

The American bar can make its contribution to the elevation of the American spirit by reaffirming, rather than attacking, old-fashioned principles. May I refer you again, in this connection, to my two book reviews in Volume 14

of *The Lawyers Guild Review* as well as to my two letters to a member of our state supreme court in the summer of 1955. The American bar—this local bar association, as well as the American Bar Association—should indicate that men of principle who have a sense of duty are desirable. The Illinois bar, for instance, should invite Charles Summers to return to Illinois and ask him to do us the courtesy and honor of being admitted to our bar. And this decision should be publicized. The American bar should publicly honor, rather than attack or ignore, that handful of lawyers who have been taking unpopular cases involving Communists. Instead, we have seen the American Bar Association applaud rather than repudiate instantly an Attorney-General who dared to use their forum to announce he was initiating political reprisals against a rival bar association. If you take and publicize such actions as these, the young will see, learn and conduct themselves accordingly. Until you set the proper example, you must depend on those few among you who will resist the demands of the many.

Where, in the Illinois bar, or for that matter in the American bar, is the man of stature and wisdom who can and will help the bar rediscover principles it has lost sight [fol. 416] of? Where is the man of the integrity and courage of lawyers such as Andrew Hamilton, John Adams, Daniel Webster, and above all the man whose many pictures have looked down sorrowfully the last few months on the spectacle in this chamber, the immortal Lincoln? The American bar needs a real leader, a leader who will not settle for mediocrity, a leader and new founder of the bar who deserves your respect and who understands and fulfills his responsibilities.

My own role, I must admit, is a much more modest one. My sphere is limited; my influence small. And, I am afraid, I speak not to the generation of this Committee, but perhaps to my own generation and certainly to one that follows. I have put on record a reasonable, humane and just alternative to what this Committee has been doing. I have, of course, made mistakes during these many hours of interrogation and conflict. But one thing is clear: I have learned through the hours and years: My position

has become stronger, and the need and justification for it more and more apparent to those who will but read, pause and reflect. Yet I am prepared, if the events so dictate, to say with Edmund Burke,

> 'It is little to the credit of the age, that what has not plausibility enough to find an advocate, has influence enough to obtain a protector.'

However this matter is resolved, those who come after me need only examine this record with a little care to learn how a dignified contribution to the public good can be made. They need only study this record to see why certain basic constitutional principles are important and why elementary rules of evidence and logic are vital to the administration of justice. I believe, that is, I have traced out the foundations on which a nobler edifice might be erected. I grant you have the power to intimidate young applicants for admission to the bar, but only those applicants who, in the words of the Canons of Ethics, have forgotten or who have [fol. 417] never been taught

> 'that the profession is a branch of the administration of justice and not a mere money-getting trade.'

It is time now to close. Differences between us remain. I leave to others the sometimes necessary but relatively easy task of praising Athens to Athenians. Besides, you should want no higher praise than what I have said about the contribution the bar can make to republican government. The bar deserves no higher praise until it makes that contribution. You should be grateful that I have not made a complete submission to you, even though I have cooperated as fully as good conscience permits. To the extent I have not submitted, to that extent have I contributed to the solution of one of the most pressing problems that you, as men devoted to character and fitness, must face. This is the problem of selecting the standards and methods the bar must employ if it is to help preserve and nourish that idealism, that vital interest in the problem of justice, that so often lies at the heart of the intelligent and sensitive law student's choice of career. This is an idealism which so many things

about the bar, and even about bar admission practices, discourage and make unfashionable to defend or retain. The worthiest men live where the rewards of virtue are greatest.

I leave with you men of Illinois the suggestion that you do yourselves and the bar the honor, as well as the service, of anticipating what I trust will be the judgment of our most thoughtful judges. I move therefore that you recommend to the Supreme Court of Illinois that I be admitted to the bar of this State. And I suggest that this recommendation be made retroactive to November 10, 1950 when a young Air Force veteran first was so foolish as to continue to serve his country by daring to defend against a committee on character and fitness the teaching of the Declaration of In- [fol. 418] dependence on the right of revolution.

13. Conclusion.

Since there are no further questions or requests, permit me to close the record with an informal but appropriate benediction to match the informal invocation seen in the oath administered to me at the start of these hearings in February. I leave with you the Scotchman's Prayer,

> 'God grant that I be right, for I cannot be other than I am.'

[fol. 419] COLLOQUY

Commissioner Stephan: Now, do you plan to file a brief, in addition to this?

Mr. Anastaplo: No, sir, that is, unless there is some other matter that the Committee should raise.

Commissioner Stephan: This is a combination of oral argument and brief, as headed.

Mr. Anastaplo: Yes.

Commissioner Weiss: You have authorities listed in this argument, I see.

Mr. Anastaplo: Yes, sir. It is prepared to read orally, if you want me to read it orally.

Commissioner Weiss: Well, I think it would be easier to have it before us in transcript form; don't you, Mr. Anastaplo?

Mr. Anastaplo: There is one other matter, and that is the Konigsberg record, which I am willing to leave with you until the library duns me for it.

Commissioner Stephan: It would help us if we could have it for a while. Can you get the book extended?

Mr. Anastaplo: I have it on an indefinite loan.

Commissioner Stephan: I will see that you get it back.

Mr. Anastaplo: It will be helpful with respect to some of the argument I make in the case, in my final argument. Whenever you want it returned, simply let me know, and I will pick it up from next door.

Commissioner Stephan: This will conclude the rehearing in this matter. If we have any further questions or matters to check up with you we will get in touch with you. If we don't, you will hear the decision in due course. Thank you for your prompt attention and attendance.

[fol. 420] Commissioner Moses: In the meantime, Mr. Anastaplo will get the transcript of the last hearing and this hearing, so that he can be sure that it is correct.

Commissioner Stephan: I suggest you wait until these two transcripts, the transcripts of the last two hearings, come to you, and then come in with your corrections, and you see Mr. Cain initially.

Mr. Anastaplo: All right, thank you, Mr. Chairman. May I bid you good-day.

Commissioner Stephan: Good-bye.

Mr. Anastaplo: Good-bye.

[Mr. Anastaplo was excused.]

[The hearing adjourned at three-twenty o'clock.]

[fol. 421] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 422] Rules of Procedure, Committee on Character and Fitness of Applicants for Admission to the Bar for the First Appellate Court District of Illinois (September 1, 1939). [These Rules have not been suspended. Transcript, p. 78.]

Rule 1. Organization of the Committee. Upon the appointment of the Committee by the Supreme Court in October of each year, the Committee shall convene, elect a chairman and vice-chairman, select a secretary, and consider

pending matters and the program and work of the Committee for the ensuing year.

Rule 2. Division into sections. For the consideration of applicants on first hearing, the Committee, exclusive of *ex officio* members, shall be divided into five sections each composed of three members. The chairman shall assign membership on the several sections and appoint a chairman of each.

Rule 3. Meetings of sections. Chairmen of the sections after consulting with their associates shall fix the times for the sessions of their respective sections.

Rule 4. Hearings. An applicant shall be heard in the first instance by a section. A section shall be considered in session when two of its members are present and participating in the examination of each applicant. The chairman or vice-chairman of the Committee may act, or may designate a member of the Committee to act, as substitute for any absent member of a section. Whenever two members of a section shall not be present as provided in this paragraph the session shall be adjourned to a day certain or to the next regular session of the section.

Rule 5. Favorable action by section. Each section, being regularly in session, shall have power by unanimous vote to recommend to the Committee the issuance of a certificate to an applicant who has appeared before it in accordance with these rules.

Rule 6. Unfavorable action by section. Whenever a section or any member thereof is not satisfied that an applicant before it in accordance with these rules has the requisite qualifications to justify the issuance of a certificate to such applicant, his application shall be referred to the Committee; but an applicant shall not be referred to the Committee, if two members of the section desire to continue the matter for further investigation, until such investigation has been completed.

Rule 7. Record to be submitted by applicant. The applicant shall file with the Secretary of the Committee: (1) a verified questionnaire on the form prescribed by the Board of Law Examiners, filled out in his own handwriting; (2) the

affidavits of at least three reputable persons, acquainted personally with him, residing in the county in which the applicant resides, each testifying that the applicant is known to the affiant to be of good moral character and general fitness to practice law, setting forth in detail the facts upon which such knowledge is based; (3) the affidavits of three practicing lawyers with similar content, unless excused by the Secretary; (4) a recent photograph not [fol. 423] more than 3" x 2" in dimension, with light background, across which applicant shall sign his name in ink. The Secretary shall attach to the questionnaire, as a part of the record, replies received from employers and other references given by the applicant in his questionnaire. When the records of applicants above required are completed, the Secretary shall assign the same as evenly as may be among the five sections of the Committee.

Rule 8. Applicants on foreign license. Applicants on foreign license whose applications are based on a period of practice shall file affidavits or satisfactory letters by three lawyers of each of the jurisdictions where the applicant has practiced. These shall be in addition to the three affidavits required by Rule 58 of the Supreme Court. The secretary shall also send inquiries to Bar Associations or to lawyers of good standing in the jurisdictions where an applicant on foreign license has practiced. The record of an applicant on foreign license shall not be complete until satisfactory replies shall have been received.

Rule 9. Examination on hearing. At the hearing before the Committee, or any section thereof, the applicant shall first be duly sworn, and thereupon interrogated orally upon the subject matter covered by the verified questionnaire and the record submitted therewith, so as to bring out fully the facts sought to be discovered by said questionnaire.

Rule 10. Subpoenaing witnesses and taking depositions. The secretary of the Committee shall, upon the request of the Chairman thereof, apply in the name of the Committee as Commissioners of the Supreme Court, to the Clerk of said Court, for the issuance of writs, etc., as required, and shall, upon like request; report to said court the failure

or refusal of any person to attend and testify in response to any such subpoena.

Rule 11. Hearings by the Committee. The Committee will not hear an applicant who has not appeared before a section, or who, having appeared there, has not been referred to the Committee as provided in these rules. When a section unanimously recommends against the issuance of a certificate to an applicant with a report setting forth the reasons for its recommendation, and the Committee has acted upon such recommendation by denying a certificate to such applicant, the Committee may subsequently in its discretion grant a further hearing to the applicant but unless the application therefor takes the form of a petition for rehearing and conforms to the requirements in these rules relative thereto, such application will not be entertained except upon the request of three members of the Committee at a session of the Committee. In all cases where application for such further hearing is granted, unless otherwise ordered by the Committee, the Chairman shall appoint a special section composed of three or more members to conduct such further hearing and report to the Committee.

Rule 12. Rehearings. An applicant who has been denied a certificate may petition for a rehearing, but not within six months of the action of the Committee in denying him a certificate, or, in the event of a second or subsequent petition for rehearing, within six months from the last action of the Committee; and no petition for rehearing will be [fol. 424] considered unless it shall include a showing of the activities and conduct of the applicant since, and circumstances and conditions arising after the last action of the Committee—all of which must be fully set forth in the petition for rehearing. In concluding his petition the applicant shall state whether or not he received assistance in its preparation. If he received assistance he shall also state the nature and extent of the assistance and by whom given. No more than three rehearings will be allowed any applicant. Petitions for rehearing shall be acted upon as promptly as the business of the Committee will permit.

Rule 13. Procedure before the Committee. All action of the Committee shall be by vote of members present at a regularly called session of the Committee. The presence of nine members shall be necessary to the transaction of business at a session of the Committee. The affirmative vote of nine members of the Committee shall be necessary to certify any applicant.

Rule 14. Communications to applicants. Committee members will not inform an applicant whether or not he will be recommended or certified. Applicants not certified will be notified in due course in writing by the secretary as to the Committee's action.

Rule 15. Committee's information confidential. Any information acquired by reason of membership on the Committee shall be regarded as confidential.

Rule 16. Adoption, amendment and suspension of rules. The affirmative vote of nine members of the Committee shall be necessary for the adoption, amendment or modification of these rules, or the temporary suspension of any of them.

[fol. 425] ANASTAPLO, George

[Handwritten notation—Applicant to Sign Picture]

BEFORE THE
CHARACTER AND FITNESS COMMITTEE
of the First Appellate Court District
State of Illinois, Cook County

In the matter of the application of George Anastaplo for admission to the Bar of Illinois on examination (X)
foreign license ( )

[Stamp—Received Oct 17 1957 Char. & Fit. 1st Dist.]

QUESTIONNAIRE AND STATEMENT OF APPLICANT

Instructions—(follow carefully)

Answers to the following questions must be in applicant's own handwriting and verified by the affidavit at the end of the questionnaire.

Applicant must answer fully, truthfully and accurately all questions and each subdivision thereof. Any omissions or inaccuracies may result in rejection. Where yes or no clearly suffices, employ that form of answer, but in case of doubt, amplify.

If the space for any answer be insufficient, complete your answer on a separate attached sheet specifying the number of the question and bearing your signature.

Applicants who have previously been licensed to practice law in any other jurisdiction must also answer the Supplemental Questionnaire.

QUESTIONNAIRE

1. (a) Give your full name George Anastaplo

Age 31

Birthplace St. Louis, Mo.

Date of birth 7 Nov. 1925

If born in a foreign country, state at what age you came to the United States. .

Present residence address 6030 Ellis Avenue, Chicago 37, Illinois

Length of residence at such address 2½ years

With whom do you reside? Wife and three children

How long have you resided in Illinois? 22 years

Present office address, if any University College 19 So. LaSalle

Where do you intend to practice? Illinois

[Handwritten notation—

Please note:
Reference is made, in my answers to several questions, to "October 26, 1950," which is the date of the previous "Questionnaire and Statement of Applicant" I filed with this Committee. Reliance upon that questionnaire seems to be in compliance with the directions provided in the Committee letter of Sept. 30, 1957.]

[fol. 426] (b) State every residence you have had in the United States or elsewhere since you were 14 years of age, with exact address of each and the month and year of the beginning and ending of each such residence. (Addresses since Oct. 26, 1950)

Period	*Street and Number*	*City and State*	*With Whom*
1) To Jan 1951	1243 E. 58th	Chicago 37	Wife and child
2) Feb-Aug 1951	12, rue Pierre Mille	Paris, France	Wife and child
3) Sept-Dec. 1951	2831 The Mall	Dallas, Texas	Wife and child
4) Jan-Mar 1952	——	Carterville, Illinois	Parents, wife, and child
5) Mar-Sept 1952	1465 E. 54th Place	Chicago 15	Wife and child
6) Sept 1952-Mar 1955	6026 Ellis	Chicago 37	Wife and two children
7) April-July 1955	12, Avenue Ltdro Rollin	Paris, France	Wife and two children
8) Aug 1955-present	6030 Ellis	Chicago 37	Wife and three children

(c) If citizenship is claimed through naturalization, furnish the following data from the certificate of naturalization:

Certificate number ..... To whom issued .....

By what court ..... On what date .....

At what place .....

Certificate must be produced for examination by the Committee or its representative.

(d) Have you ever been known by any given name or surname other than those given above? No

State other name with dates, facts and reasons for any change in name.

(e) Are you married or single? Married

Have you ever been married?

If married, when and to whom? 28 January 1949, to Sara J. Prince.

[fol. 427] Have you been divorced? No. If so, give title and general number of suit, name of court, date of decree, grounds alleged in complaint, by whom obtained, and names of all attorneys in the case:

2. Give the following information about your parents:

Name:	Present residence (or if deceased so indicate):
Father	
Theodore Anastaplo	(deceased)
Mother	
Margaret Anastaplo	Carterville, Illinois
Birthplace:	**Last and present occupation. (Be specific. "Merchant" or "manufacturer" is not sufficient):**
Father	
Greece (Divritzi Gortinia)	Restaurant owner and operator at Carterville, Illinois
Mother	
Greece (Divritzi Gortinia)	Housewife

3. State all schools below college grade attended, giving month and year of the beginning and ending of attendance at each. If a high school graduate, give name of high school and date of graduation.

	Name of School	*City or town State*	*Month and year of beginning and ending of attendance.*
(1)	Stix Grade School	St. Louis, Mo.	Sept. 1930-Dec. 1934
2)	Carterville Grade School	Carterville, Ill.	Jan 1935-June 1939
3)	Carterville High School	Carterville, Ill.	Sept 1939-June 1943

Date of high school graduation and name of school 28 May 1943 Carterville Community High School, Carterville, Ill.

[fol. 428] 4. State all colleges attended, giving month and year of the beginning and ending of attendance at each, what the nature of your attendance was and degrees received. (Omit law schools in this answer.)

Name of college	*Where located*	*Day, evening, extension or summer attendance*	*Period of attendance*	*Degrees received and dates*
(In addition to those listed in Questionnaire of Oct. 26, 1950:)				
Committee on Social Thought, University of Chicago	Chicago, Illinois	Day	Oct 1955 to present	——

If degree was not received state reason: I have been admitted to candidacy for the PhD degree. All requirements for the PhD have been completed except for the Thesis and subsequent examinations. The thesis is tentatively titled, "The Historical and Philosophical Background of the First Amendment of the Constitution of the United States." Professor F.A. Hayek is chairman of my Thesis Committee.

5. State all law schools attended, giving month and year of the beginning and ending of attendance at each, what the nature of your attendance was and degrees received.

(In addition to those listed in Questionnaire of Oct. 26, 1950:)

Name of law school	*Where located*	*Day, evening or summer attendance*	*Period of attendance*	*Degrees received and dates*
Southern Methodist School of Law (work in Oil and Gas Law)	Dallas, Texas	Day	Sept.-Dec. 1951	——

If degree was not received state reason: I left Southern Methodist to return to Illinois, secure employment, and place myself in a position from which I could sustain extended litigation in connection with my admission to the bar of this state.

[fol. 429] 6. Have you ever been dropped, suspended, disciplined, or expelled from any school, college, law

school or other similar institution, or accused of any dishonesty in connection therewith? No. If your answer is yes, state the cause and the circumstances.

7. (a) Have you ever worked in a law office? No. If your answer is yes, give a full list of such offices and specify the dates of the period of your employment in each, and the nature of your work.

(b) Have you at any time studied in a law office or under the personal tuition of a lawyer? (Include quiz courses.) No. If so, state names of all lawyers studied under and specify dates of study.

(c) If you are claiming credit for such study to satisfy law study requirements for admission to the bar, state whether such study was supervised as provided in the Supreme Court rule. ——

8. Have you ever applied for admission to practice as an attorney or counselor in any court in any jurisdiction, state or country? Yes. If so, specify when and where, and give the result of every such application. An unsuccessful attempt to secure admission to the Illinois bar was initiated September 1950 and was concluded, except for the present proceedings, in 1955. *In re Anastaplo*, 3 Ill. 2d 471, 121 N.E. 2d 826; 348 U.S. 946, 349 U.S. 903, 908.

NOTE: If you have previously been licensed to practice law in any other jurisdiction, procure and fill out the Supplemental Questionnaire.

[fol. 430] 9. (a) Have you previously applied for admission to the bar of the State of Illinois either upon examination or upon license issued in another state or country? Yes. If so, state when and why you were not then admitted. Please see answer to Question 8. The official explanation of why I was not admitted may be found at, *In re George Anastaplo*, 3 Ill. 2d 471, 121 N.E.2d 826 (1954).

(b) How many times have you taken the Illinois Bar Examination? Once. Give dates and results: Sept. 5, 6, 7; 1950; at Chicago; passed.

(c) Have you read Rule 58 of the Supreme Court rules, concerning admission to the bar of Illinois? Yes.

10. (a) Have you ever been engaged in any occupation, business or profession whatever? Yes. If so, give the month and year of the beginning and ending of each occupation, nature of business, name and address of each employer, if any, the position you occupied and the reason why you left each employment or occupation.

	Period	*Nature of business*	*Name of employer*	*Address of employer*	*Position*	*Reason for leaving*
1	March 1952-August 1957	Research and writing	Industrial Relations Center, University of Chicago		Research Assistant ——— Research Associate	To accept present positions
2	Sept-Nov. 1955	Driving taxi-cab	Checker Cab Co.	Chicago	Driver	Temporary supplementary employment
3	Jan. 1957 to present	Teaching (½ time)	University College, University of Chicago		Lecturer in the Liberal Arts	———
4	Aug 1957 to present	Research (½ time)	University College, University of Chicago		Research Associate	———

(b) Were you ever required to furnish a bond in connection with any office or employment and if so, specify name of employer, nature and period of employment, amount of bond, name of bonding company or other surety, and whether any one ever made a claim under your bond or sought to cancel it. (State facts fully). None.

[fol. 431] (c) Were you ever accused by any employer, superior, associate, customer or other person of dishonesty in connection with any employment or occupation? No. If answer is yes, state facts fully.

(d) Have you been discharged by any employer? No. If so, state the cause and the circumstances.

(e) Have you ever applied for or taken any examination for any license (other than attorney at law), position or office, the procurement of which required proof of good character? No. If answer is yes, specify all applications, including applications for reinstatement and withdrawn applications, all examinations, whether successful or not, and the date of each, the name and address of the authority to whom the application was addressed or by whom such examination was given and the result of each, with any reasons given for each rejection.

(f) Have you ever held a license, other than as attorney at law, or official position which required proof of good character? No. If so, state the nature thereof, date granted or held, period covered and name and address of authority issuing license or making appointment to official position.

11. State whether you have been

(a) a party (either plaintiff or defendant) to or otherwise involved in any action or legal proceeding, either civil or criminal or quasi-criminal including any proceedings in the Juvenile Court; Yes.

(b) charged with crime, or arrested; Only in connection with Question 11(c).

[fol. 432] (c) charged with violation of any motor vehicle law; Yes.

(d) summoned for violation of any other statute or ordinance; No.

(e) in bankruptcy; No.

(f) adjudged incompetent or insane by any court. No.

If your answer be yes to any division of this question, state the facts fully below, designating by letter the division referred to, and giving names of cases, courts

where heard, and dates of all court proceedings mentioned in your answer with the results thereof.

(a) *In re Anastaplo*, 3 Ill. 2d 471, 121 NE2d 826; 348 U.S. 946, 349 U.S. 903, 908. (Bar admission case, 1954-1955) (Please see answer to Question 8.)

(c) (i) Jan. 1952, 61st and University, Chicago 37. Charge: driving with obstructed vision from rear window. Charge dismissed.

(ii) Nov. 1955, South Park and 35th, Chicago. Charge: driving taxi-cab 35 m.p.h. in 25 m.p.h. zone. $5.00 fine; $3.00 costs.

12. (a) Are you indebted to anyone for money borrowed or otherwise and are there any unsatisfied judgments against you? No. If so, list the same giving names of creditors, amounts, dates and nature of indebtedness or judgment.

(b) Has anyone ever asserted a claim against you? No. If so, what was the result or what is the present status thereof?

[fol. 433] 13. Give the names, occupations and addresses of at least five persons to whom you refer as to your character. (These should be persons not related to you who have known you for at least five years and the acquaintance should be more than casual. They need not be lawyers.)

Name	*Address*	*Occupation*	*Nature and Length of Acquaintance*
Alexander Meiklejohn	1525 LaLoma Ave Berkeley 8, Calif.	Teacher and author	Approximately 5 years —personal contacts and correspondence
Malcolm P. Sharp	The Law School, University of Chicago	Teacher and attorney	Since 1948—teacher and personal contacts
Roscoe T. Steffen	The Law School, University of Chicago	Teacher and attorney	Approximately 5 years —personal contacts
Richard Weaver	The College, University of Chicago	Teacher and author	Since 1948 —personal contacts
Yves R. Simon	820 N. Notre Dame Av. South Bend, Ind	Teacher and author	Since 1955—teacher, Committee on Social Thought
George F. Archer	5110 S. Kenwood Chicago 15, Ill.	Attorney	Since 1950 —law school classmate.

14. State your reasons for desiring to enter the profession of the law. The bar can provide one an opportunity to fulfill, in a public capacity, the obligations of a good citizen set forth in the answer to Question 19(c). I may be able to contribute something to the bar and the community it serves if this opportunity should become available. (I have attempted to indicate some of the obligations of the bar and of the lawyer in a review of Blaustein and Porter, *The American Lawyer*, 14 Law. Guild Rev. 178 (Winter 1954).

15. (a) State fully the extent of your study of the ethics of the profession of the law. In addition to the answers given in the Questionnaire of Oct. 26, 1950, I have had many occasions, in the course of my bar admission litigation, to study cases and articles on the ethics of the profession. I have also written a review of Drinker, *Legal Ethics*, 14 Law. Guild Rev. 144 (Fall 1954).

(b) Are you familiar with the canons of professional ethics of the American Bar Association? Yes.

(c) Has your conduct ever been called in question with reference to the unauthorized practice of law? No. Have you ever been employed or otherwise connected with any person, firm or corporation whose conduct was called in question on the subject of unauthorized practice of law while you were so employed or connected? No. If your answer be yes as to any part of this question, state the matter fully.

[fol. 434] 16. (a) Have you participated in activities of a public or patriotic nature (including military and war services) or in philanthropic, religious, or social services? Yes. If so, state fully.

1) Air Force, U.S., 1943-1947; Navigator (B-29's, B-17's, C-54's). Active duty rank, 2d Lt. Saw duty in United States, Pacific, Europe, Africa, and Middle East.

2) *In re George Anastaplo*, 3 Ill. 2d 471, 121 N.E. 2d 826; 348 U.S. 946, 349 U.S. 903, 908. (1950-1955)

(b) If you have ever had any public office either by election or by appointment, state the nature thereof and when and where. None

(c) If you have ever served as judge or clerk of election, state when and where.

1) Election Judge and Registration Officer, Chicago, 1956) Ward 5
2) Judge of Elections, Chicago, June 1957 (permanent appointment)) Precinct 45

(d) When and where did you last vote in an election? Chicago—Ward 5, Precinct 45—Nov. 1956; June 1957.

17. Have you ever been suspended, disqualified or disciplined as a member of any profession, or have you ever been removed from any office, public or private, because of conduct reflecting upon your character or have any charges been made or filed or proceedings instituted against you? ..... If your answer be yes, state facts fully. Disqualified in the sense stated in answer to Question 8.

18. Are there any incidents in your life reflecting on your character whether at school, college, law school, in business, or otherwise, not disclosed in your answers to this questionnaire? No. If the answer be yes, state the facts fully,

19. State what you understand to be the principles underlying

(a) the Constitution of the United States. One principle consists of the doctrine of the separation of powers; thus, among the Executive, Legislature and Judiciary are distributed various functions and powers in a manner designed to provide for

a balance of power and to prevent totally unrestrained action by any one branch of government. Another basic principle is that such government is constituted so as to secure certain inalienable rights, those rights to Life, Liberty and the Pursuit of Happiness (and elements of these rights are explicitly set forth in such parts of the Constitution as the Bill of Rights). And, of course, whenever the particular government in power becomes destructive of these principles and ends, it is the right of the people to alter or to abolish it and thereupon to establish a new government.

[fol. 435] (b) the Constitution of the State of Illinois. The principles underlying this state constitution are similar to those that form the bases of the federal constitution. A crucial point of difference, however, lies in the fact that the state is basically subordinate to the federal government. But even within this framework the state government has considerable capacity to do justice, to preserve liberties, and to promote the general welfare of its citizens.

Quotation from the preambles of the two Constitutions is not a sufficient answer.

(c) State what you believe are some of the obligations of good citizenship. In addition to the answer given in my Questionnaire of Oct. 26, 1950, I should like to emphasize the obligation of a good citizen to "honestly strive against the many lawless and unrighteous deeds which are done in a state."

20. Do you now without any mental reservation and will you hereafter loyally support the Constitution of the United States and the Constitution of the State of Illinois? Yes.

Signature of Applicant /s/ GEORGE ANASTAPLO

Telephone: Office DE-2-7245

Telephone: Home DO-3-4825

STATE OF ILLINOIS,
County of Cook, *ss.*:

GEORGE ANASTAPLO being duly sworn says: I have read the foregoing questions and have answered them in my own handwriting fully and frankly. The answers subscribed by me are true of my own knowledge.

Signature of Applicant /s/ GEORGE ANASTAPLO

Subscribed and sworn to before me this 15 day of Oct. 1957.

S. JAY BAIM
Notary Public

[Seal]



[fol. 437]

6030 Ellis Avenue
Chicago 37, Illinois

16 October 1957

[Stamp—Received Oct 17 1957 Char. & Fit. 1st Dist.]

Mr. Richard H. Cain, Secretary
Committee on Character and Fitness
29 South LaSalle Street
Chicago 3, Illinois

Dear Mr. Cain:

In accordance with your letter of September 30, 1957, I am submitting the following materials to the Committee at this time:

1. A new questionnaire and application, with special emphasis upon pertinent information since October 26, 1950, the date of my previous application and questionnaire. You will note that I have simply referred to the former questionnaire in answers to questions where duplication would only have taken up space that might have been more appropriately used for new information.

2. Included in this questionnaire are six new references, in answer to question 13. Since the emphasis of the Committee seems to be on *new* references and on references that might speak to the question of my present reputation and recent activities, I am listing one or two individuals who have not known me five years.

   Most of the people who know me more than five years are those whom I knew before coming to Chicago to attend school. But these are also people with whom I have had little contact in recent years, precisely because I am in Chicago. If I am to be able to supply references who can speak about my present activities and reputation, therefore, I have to choose individuals from the Chicago community whom I have

known for a relatively short time. As you will see, my selections are designed to give the Committee contact with various facets of my activities the past seven years.

I should also add that several of the references will not be able to speak to such questions as the names and origins of parents, previous residences, etc. I would appreciate it if the Committee would indicate to them that they should feel free to write at length, and to attach an extra sheet for that purpose if they wish, on those questions they *are* able to answer.

3. Character reference affidavits by three persons residing in this jurisdiction.

4. Affidavits by three practicing lawyers in Cook County.

If additional material is needed, please let me know.

May I suggest that other material that might have a bearing on either my activities or my reputation are to be found in the various law review articles and comments, relating to my bar admission matter, which I have cited to the Committee from time to time.

Thank you for supplying me with the dissents of Mr. Rothschild and Mr. Sawyier. I will await further instructions from you.

Respectfully yours,

/s/ GEORGE ANASTAPLO
George Anastaplo

[fol. 438] (ATTORNEY'S AFFIDAVIT)

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO 3

[Stamp—Received Oct 17 1957 Char. & Fit. 1st Dist.]

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.*:

In re GEORGE ANASTAPLO
an applicant for admission to the Bar.

STEPHEN LOVE being duly sworn, on oath states, that he is a practicing attorney of the State of Illinois, admitted to the Bar in the year 1912, that he resides at 1350 Lake Shore Dr., Chicago, within the First Appellate Court District of Illinois, that he has known GEORGE ANASTAPLO for about 5 years, and that he verily believes that the said applicant is of such moral character and general fitness as justifies his admission to the Bar. The facts upon which affiant's knowledge of the said applicant is based are as follows: (A full and complete statement of facts must be set forth.)

I am informed that Mr. Anastaplo made a splendid record as a student at the University of Chicago's Law School. I have spoken with a number of his teachers and they are all very high in their encomiums of him. From my own personal observation and contact, I have developed a great respect for Mr. Anastaplo's character and integrity. He has adhered to a position he has thought to be right, even at the risk of jeopardizing his career. He is precisely the type of man we need at the bar: a lawyer who will adhere to his principles, no matter what the cost of such adherence may be. He will be a splendid addition to the bar, I am sure.

This affiant on oath states he has never heard of any fact, rumor or charge reflecting on the reputation or character of the applicant.

/s/ STEPHEN LOVE
STEPHEN LOVE

Subscribed and sworn to before me this 8th day of Octol r, A. D. 1957.

/s/ HANNAH H. SPITZ
Notary Public

[Seal]

[fol. 439] (ATTORNEY'S AFFIDAVIT)

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO 3

[Stamp—Received Oct 17 1957 Char. & Fit. 1st Dist.]

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.*: In re GEORGE ANASTAPLO
an applicant for admission to the Bar.

William M. Trumbull, being duly sworn, on oath states, that he is a practicing attorney of the State of Illinois, admitted to the Bar in the year 1941, that he resides at 880 Lake Shore Drive, Chicago, within the First Appellate Court District of Illinois, that he has known George Anastaplo for six years, and that he verily believes that the said applicant is of such moral character and general fitness as justifies his admission to the Bar. The facts upon which affiant's knowledge of the said applicant is based are as follows: (A full and complete statement of facts must be set forth.)

Affiant first met Applicant in 1951 through Applicant's University of Chicago law classmate, J. William Hayton, Esq., with whom Affiant was associated at Bell, Boyd, Marshall & Lloyd. Since that time Affiant has seen Applicant on a considerable number of occasions, corresponded with him, and discussed various matters with him, and Affiant is familiar to some extent with Applicant's conduct and activities from 1951 to date.

Affiant has studied carefully the transcripts of proceedings before the Committee on Character and Fitness in 1950 and 1951; briefs and memoranda filed by Applicant in the Supreme Court of Illinois; the opinion of that Court, *In re Anastaplo*, 3 Ill. 2d 471 (1954); and copies of subsequent letters and other papers filed by Applicant with the Committee.

Affiant has found Applicant to exhibit in all respects an exceptionally high degree of honor and integrity and profound loyalty to his country, its form of government and its ideals, and to enjoy an excellent reputation for good moral character.

This affiant on oath states that he has never heard of any fact, rumor or charge reflecting on the reputation or character of the applicant.

/s/ WILLIAM M. TRUMBULL

Subscribed and sworn to before me this 14th day of October, A. D. 1957.

/s/ ELSIE M. LOUIS
Notary Public

[Seal]

[fol. 440] (ATTORNEY'S AFFIDAVIT)

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO 3

[Stamp—Received Oct 17 1957 Char. & Fit. 1st Dist.]

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.*: In re GEORGE ANASTAPLO
an applicant for admission to the Bar.

Angelo G. Geocaris being duly sworn, on oath states, that he is a practicing attorney of the State of Illinois, admitted to the Bar in the year 1948, that he resides at Winnetka, Illinois within the First Appellate Court District of Illinois, that he has known George Anastaplo for 8 years, and that he verily believes that the said applicant is of such moral character and general fitness as justifies his admission to the Bar. The facts upon which affiant's knowledge of the said applicant is based are as follows: (A full and complete statement of facts must be set forth.)

I have known the applicant for approximately eight years. During this period he has demonstrated an exceptionally high moral standard. He appears to me to be a young man of intense dedication and sterling intellectual capacity. His application to principle recalls the zeal of the founders of our democracy. I am aware of his previous attempts to be admitted to the Bar. While I have not been informed of the precise reasons for the denials, I know nothing which should preclude his admission. His personal code of ethics is unexcelled by any practicing attorney I have met in the state of Illinois.

This affiant on oath states that he has never heard of any fact, rumor or charge reflecting on the reputation or character of the applicant.

/s/ ANGELO G. GEOCARIS

Subscribed and sworn to before me this 11th day of October, A. D. 1957.

/s/ ADELE C. SEFTON
Notary Public

[Seal]

[fol. 441] (CHARACTER AFFIDAVIT)

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO 3

[Stamp—Received Oct 17 1957 Char. & Fit. 1st Dist.]

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.*: In re—MR. GEORGE ANASTAPLO
an applicant for admission to the Bar.

Robert J. Coughlan being duly sworn, on oath states, that he resides at 2541 E. 73rd St., Chicago 49, Ill. within the County of Cook, State of Illinois, that his occupation is Research Associate and Division Director, that he has known Mr. George Anastaplo for approx. 5 years, and that he verily believes that the said applicant is of such moral character and general fitness as justifies his admission to the Bar of Illinois. The facts upon which affiant's knowledge of the said applicant is based are as follows: (A full and complete statement of facts must be set forth.)

(The following statements do not include a consideration of the applicant's case before the Committee, of which the Committee is familiar.)

I directly supervised the applicant's work for a period of two years at The Industrial Relations Center, The University of Chicago. Prior to that I worked with him as an associate for approximately another two years at the same organization. At all times and under all circumstances during this working relationship, I was deeply impressed and edified by the applicant's character and fitness, both for positions involving either private or public confidence and trust. The applicant's character and fitness—in fact, his way of life—is, in my opinion, one of the finest expressions of humanist thought, feeling and action. He was a source of inspiration to myself and my other colleagues in the noblest traditions of the academic spirit—the selfless pur-

suit of Truth. His honesty and integrity are, in my opinion, beyond question. I would highly recommend him without the slightest reservation for any position involving the highest or most sacred trust. The applicant is a rare man among us today: he has an inviolable sense of Honor in the great traditions of Greek culture and thought. If admitted to the American Bar, he could do nothing that would not reflect glory on that institution.

This affiant on oath states that he has never heard of any fact, rumor or charge reflecting on the reputation or character of the applicant.

/s/ Robert J. Coughlan

Subscribed and sworn to before me this 4th day of October, A. D. 1957.

/s/ Edgar E. Swanson Jr.
Notary Public

My Commission Expires May 10, 1959

[Seal]

[fol. 442] (CHARACTER AFFIDAVIT)

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO 3

[Stamp—Received Oct 17 1957 Char. & Fit. 1st Dist.]

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.*: In re GEORGE ANASTAPLO
an applicant for admission to the Bar.

Kermit Eby affirms that he resides at 7700 S. Euclid within the County of Cook, State of Illinois, that his occupation is Prof. of Social Science, that he has known Geo. Anastaplo for 7 years, and that he verily believes that the said applicant is of such moral character and general fitness as justifies his admission to the Bar of Illinois. The facts upon which affiant's knowledge of the said applicant is based are as follows: (A full and complete statement of facts must be set forth.)

He was a student of mine—one of the best. His moral character and integrity are the highest. I know no one, professor or student who would not affirm same.

This affiant affirms that he has never heard of any fact, rumor or charge reflecting on the reputation or character of the applicant.

/s/ KERMIT EBY

Subscribed and sworn to before me this 9 day of October, A. D. 1957.

/s/ A. WAYNE GIESEMAN
Notary Public

(Seal)

My Commission Expires October 26, 1960
A. Wayne Gieseman, Notary Public.

[fol. 443] (CHARACTER AFFIDAVIT)

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO 3

[Stamp—Received Oct 17 1957 Char. & Fit. 1st Dist.]

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.*:

In re GEORGE ANASTAPLO
an applicant for admission to the Bar.

Nicholas J. Melas being duly sworn, on oath states, that he resides at 6830 South Clyde Ave., Chicago within the County of Cook, State of Illinois, that his occupation is Administrative Assistant to the Sheriff, that he has known George Anastaplo for Six years, and that he verily believes that the said applicant is of such moral character and general fitness as justifies his admission to the Bar of Illinois. The facts upon which affiant's knowledge of the said applicant is based are as follows: (A full and complete statement of facts must be set forth.)

Mr. Anastaplo was appointed a Research Assistant in the Industrial Relations Center of the University of Chicago in March of 1952 where I was engaged as a Research Associate and Project Director. He worked under my immediate supervision until December 1954 when I took leave of absence to accept my present position. During those years we were developing management training programs for executives of leading American corporations including the New York Central Railroad, Corn Products Refining Company, The J. L. Hudson Company, etc.

From time to time, we have discussed his appeal of the earlier decision of the Committee on Character and Fitness and the issues raised by his case. In these discussions, he demonstrated a basic understanding of our free institutions

and the principles upon which they are founded. This leads me to believe that, as a member of the Bar, Mr. Anastaplo

(Continued on attached sheet)

This affiant on oath states that he has never heard of any fact, rumor or charge reflecting on the reputation or character of the applicant.

/s/ NICHOLAS J. MELAS

Subscribed and sworn to before me this 9 day of October, A. D. 1957.

/s/ MARIE PEDERSEN
Notary Public

(Seal)

[fol. 444] (Character Affidavit)

COMMITTEE ON CHARACTER AND FITNESS

In re: George Anastaplo

[Stamp—Received Oct 17 1957 Char. & Fit. 1st Dist.]

(Continued)

would indeed be an outstanding defender of our State and Federal Constitutions.

As a result of my close observation of him during those years, and my contacts with him since then, I have formed a very high opinion of his ability, his character and his integrity. His forthrightness and honesty of purpose are an example to all who know him. I particularly admire the manner in which he maintained his equanimity in his work relationships as well as in his home and family life in spite of the continued strains he was undergoing.

I feel that he is possessed of all those qualities of character and moral integrity necessary to admission to practice before the Bar of Illinois.

/s/ NICHOLAS J. MELAS
NICHOLAS J. MELAS

[fol. 445] KINDLY RETURN PROMPTLY

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO

RICHARD H. CAIN
SECRETARY

November 1, 1957

[Stamp—Received Nov 21 1957 Char. & Fit. 1st Dist.]

University College
University of Chicago
Chicago, Illinois

Dear Sir:

George Anastaplo has applied for admission to the Bar of the State of Illinois. He states that he was in your employ August 1957 to present—Research—(½ time)—Research Associate. Your answers to the following questions will be appreciated by the above Committee before which his application is pending.

/s/ RICHARD H. CAIN
Secretary.

1. Has applicant correctly stated the term of his employment by you? He teaches philosophy half-time and is my research associate on a $160,000 foundation-financed research study the rest of the time.

2. What do your records show as to applicant's .....

Honesty? Admirable: unequivocal, searching mind

Integrity? For our current culture, perhaps even over-rigid

General Conduct? Able, unpretentious, brilliant, professionally used to the searching inquiry, but able to communicate effectively.

3. Was applicant ever disciplined while in your employ? No.

4. Why did he leave your employ? We persuaded him to leave another post elsewhere in the University=

5. Did you ever hear of any fact, rumor or charge reflecting upon applicant's reputation and character? No. I am familiar with his application to the Bar and have read Malcolm Sharp's discussion of it. To test him, I asked the same questions as if they were barriers to his employment here. He refused to answer on the same philosophic grounds.

6. While in your employ was applicant worthy of trust and confidence? Yes.

7. Remarks: Here please state any facts favorable to or against applicant not covered by the foregoing questions which you think should be made known to the Committee in connection with its effort to determine whether the applicant is worthy of the highest trust and confidence. He is generally admired by his fellow-scholars and fellow-members of the administrative staff. He is not a bleeding heart, does not carry a torch and possesses both a sense of humor and a neat and orderly mind.

(Please sign here) /s/ Maurice F. X. Donohue
Dean University College

KINDLY RETURN PROMPTLY

[fol. 446] [Handwritten notation—Staple to 14]

THE UNIVERSITY OF CHICAGO
UNIVERSITY COLLEGE
19 S. LA SALLE ST.

DEARBORN 2-7245

Sorry this is delayed.

I have been out of the city.

I have known Mr. Anastaplo about 5 years, the last year fairly well.

/s/ MAURICE F. X. DONOHUE

[fol. 447] KINDLY RETURN PROMPTLY

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT

1140, 29 SOUTH LA SALLE STREET
CHICAGO

RICHARD H. CAIN
SECRETARY

November 1, 1957

[Stamp—Received—Nov 21 1957 Char. & Fit. 1st Dist.]

University College
University of Chicago
Chicago, Illinois

Dear Sir:

George Anastaplo has applied for admission to the Bar of the State of Illinois. He states that he was in your employ January 1957 to present—Teaching—(½ time) Lecturer in the Liberal Arts Your answers to the following questions will be appreciated by the above Committee before which his application is pending.

/s/ RICHARD H. CAIN
Secretary.

1. Has applicant correctly stated the term of his employment by you? He teaches philosophy half-time and is my research associate on a $160,000 foundation-financed research study the rest of the time.

2. What do your records show as to applicant's .....

   Honesty? Admirable: unequivocal, searching mind

   Integrity? For our current culture, perhaps even over-rigid

   General Conduct? Able, unpretentious, brilliant, professionally used to the searching inquiry, but able to communicate effectively

3. Was applicant ever disciplined while in your employ? No.

4. Why did he leave your employ? We persuaded him to leave another post elsewhere in the University=

5. Did you ever hear of any fact, rumor or charge reflecting upon applicant's reputation and character? No. I am familiar with his application to the Bar and have read Malcolm Sharp's discussion of it. To test him, I asked the same questions as if they were barriers to his employment here. He refused to answer on the same philosophic grounds.

6. While in your employ was applicant worthy of trust and confidence? Yes.

7. Remarks: Here please state any facts favorable to or against applicant not covered by the foregoing questions which you think should be made known to the Committee in connection with its effort to determine whether the applicant is worthy of the highest trust and confidence. He is generally admired by his fellow-scholars and fellow-members of the administrative staff. He is not a bleeding heart, does not carry a torch and possesses both a sense of humor and a neat and orderly mind.

(Please sign here) /s/ Maurice F. X. Donohue
Dean, University College

KINDLY RETURN PROMPTLY

[fol. 448] KINDLY RETURN PROMPTLY

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO

RICHARD H. CAIN
SECRETARY

November 1, 1957

[Stamp—Received Nov 7 1957 Char. & Fit. 1st Dist.]

University of Chicago
Industrial Relations Center
Chicago, Illinois

Dear Sir:

George Anastaplo has applied for admission to the Bar of the State of Illinois. He states that he was in your employ March 1952 to August 1957—Research Ass't.—Research Associate Your answers to the following questions will be appreciated by the above Committee before which his application is pending.

/s/ RICHARD H. CAIN
Secretary.

1. Has applicant correctly stated the term of his employment by you? Yes, with exception of leave of absence without pay during nearly three months in the summer of 1955

2. What do your records show as to applicant's Nothing derogatory in our files

   Honesty? .....

   Integrity? .....

   General Conduct? .....

3. Was applicant ever disciplined while in your employ? No

4. Why did he leave your employ? To accept another position within the University—downtown college branch

5. Did you ever hear of any fact, rumor or charge reflecting upon applicant's reputation and character? None

6. While in your employ was applicant worthy of trust and confidence? Yes—as far as I am able to determine

7. Remarks: Here please state any facts favorable to or against applicant not covered by the foregoing questions which you think should be made known to the Committee in connection with its effort to determine whether the applicant is worthy of the highest trust and confidence.

(Please signs here) /s/ Edgar E Swanson Jr
Edgar E Swanson Jr
Administrative Officer

KINDLY RETURN PROMPTLY

[fol. 449] KINDLY RETURN PROMPTLY

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO

RICHARD H. CAIN
SECRETARY

November 1, 1957

[Stamp—Received Nov 5 1957 Char. & Fit. 1st Dist.]

Checker Taxi Company
1401 W. Jackson
Chicago, Illinois

Attn: Personnel Dept.

Dear Sir:

George Anastaplo has applied for admission to the Bar of the State of Illinois. He states that he was in your employ September to November 1955—Driver. Your answers to the following questions will be appreciated by the above Committee before which his application is pending.

/s/ RICHARD H. CAIN
Secretary.

1. Has applicant correctly stated the term of his employment by you? Yes
2. What do your records show as to applicant's The same as above.

Honesty? Yes.

Integrity? Yes

General Conduct? Excellent

3. Was applicant ever disciplined while in your employ? No

4. Why did he leave your employ? To Return to School

5. Did you ever hear of any fact, rumor or charge reflecting upon applicant's reputation and character? No

6. While in your employ was applicant worthy of trust and confidence? Yes.

7. Remarks: Here please state any facts favorable to or against applicant not covered by the foregoing questions which you think should be made known to the Committee in connection with its effort to determine whether the applicant is worthy of the highest trust and confidence.

(Please sign here) /s/ George M Donald Vice Pres.
Personnel Manager

KINDLY RETURN PROMPTLY

[fol. 450] KINDLY RETURN PROMPTLY

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO 3

RICHARD H. CAIN
SECRETARY

November 1, 1957

[Stamp—Received Nov 7 1957 Char. & Fit, 1st Dist.]

Mr. Alexander Meiklejohn
1525 Laloma Avenue
Berkeley 8, California

Dear Sir:

George Anastaplo has applied for admission to the Bar of the State of Illinois. He has given this Committee your name as a reference regarding his moral character and general fitness to practice as an attorney and counsellor at law. Your answers to the following questions will be appreciated by the Committee. If any of your answers are not based on personal knowledge, please state the source of your information.

/s/ R. H. CAIN Secretary.

1. State fully how long you have known the applicant and how intimate your acquaintance with him has been. About ten years. I knew him, first, through his teachers at the University of Chicago Law School, and later, through personal acquaintance and continued correspondence.
2. How long has applicant resided in Cook County? I do not know.
3. State any former residence of applicant, if known to you. I do not know.

4. What is applicant's reputation as to honesty, integrity, and his general conduct? (Answer fully.) I have often heard him estimated by experienced and wise men who know him well. I have never heard the slightest question of his honesty, integrity or conduct. On the contrary, he is very highly rated in all these respects.

5. Was applicant ever arrested or indicted? I do not know

6. Was applicant ever a party to a law suit? I do not know

7. Have you ever heard of any fact, rumor or charge reflecting upon applicant's reputation or character? No.

8. Was applicant, or either of his parents, alien born? I do not know.

9. Have you ever heard any question raised as to applicant's adherence to and support of the principles of the Constitution of the United States? No, except in connection with his examination for admission to the bar.

10. What have you observed applicant's moral influence upon others to be? Excellent.

11. By what traits of mind and character do you consider this applicant fitted to practice law? He is intellectually able, a hard, thorough student and moved by high devotion to the principles of freedom and justice.

12. Do you consider applicant worthy of the highest trust and confidence? Yes, unqualifiedly.
(for example, would you recommend him as the guardian of a minor's estate?) Yes.

(Please sign here) /s/ ALEXANDER MEIKLEJOHN.
Professor of Philosophy, Emeritus, at the University of Wisconsin.

KINDLY RETURN PROMPTLY

[fol. 451] KINDLY RETURN PROMPTLY

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO 3

RICHARD H. CAIN
SECRETARY

November 1, 1957

[Stamp—Received Nov 6 1957 Char. & Fit. 1st Dist.]

Mr. Malcolm P. Sharp
University of Chicago Law School
Chicago, Illinois

Dear Sir:

George Anastaplo has applied for admission to the Bar of the State of Illinois. He has given this Committee your name as a reference regarding his moral character and general fitness to practice as an attorney and counsellor at law. Your answers to the following questions will be appreciated by the Committee. If any of your answers are not based on personal knowledge, please state the source of your information.

/s/ R. H. CAIN, Secretary.

1. State fully how long you have known the applicant and how intimate your acquaintance with him has been. Since the autumn of 1948, I have known the applicant first as a student and then as quite a close friend. I have seen him in his home as well as outside it.

2. How long has applicant resided in Cook County? Since 1947

3. State any former residence of applicant, if known to you. Carterville, Illinois, with periods of absence for education and military service.

4. What is applicant's reputation as to honesty, integrity, and his general conduct? (Answer fully.) His reputation in these respects is of the highest. No question has ever been raised about his honesty or his integrity, and his general conduct, characterized by friendliness, quiet independence, industry and courage, is reflected in his reputation.

5. Was applicant ever arrested or indicted? Not so far as I know.

6. Was applicant ever a party to a law suit? So far as I know, only the lawsuit of which the Committee is aware.

7. Have you ever heard of any fact, rumor or charge reflecting upon applicant's reputation or character? No.

8. Was applicant, or either of his parents, alien born? The applicant was not. His parents were originally Greek.

9. Have you ever heard any question raised as to applicant's adherence to and support of the principles of the Constitution of the United States? No, unless the questions once raised by the Committee belong here.

10. What have you observed applicant's moral influence upon others to be? His influence is excellent. He is a good parent and husband. His fellow students respect him.

11. By what traits of mind and character do you consider this applicant fitted to practice law? Thoughtfulness, care, originality, independence, acuteness; generosity, kindliness, industry, courage. He is in every way among the very best of the students I have seen in my teaching experience.

12. Do you consider applicant worthy of the highest trust and confidence? Yes
(for example, would you recommend him as the guardian of a minor's estate?) Yes

(Please sign here) /s/ MALCOLM P. SHARP

KINDLY RETURN PROMPTLY

[fol. 452] KINDLY RETURN PROMPTLY

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO 3

RICHARD H. CAIN
SECRETARY

November 1, 1957

[Stamp—Received Nov 12 1957 Char. & Fit. 1st Dist.]

Mr. Roscoe T. Steffen
University of Chicago Law School
Chicago, Illinois

Dear Sir:

George Anastaplo has applied for admission to the Bar of the State of Illinois. He has given this Committee your name as a reference regarding his moral character and general fitness to practice as an attorney and counsellor at law. Your answers to the following questions will be appreciated by the Committee. If any of your answers are not based on personal knowledge, please state the source of your information.

/s/ R. H. CAIN, Secretary.

1. State fully how long you have known the applicant and how intimate your acquaintance with him has been. Since the spring of 1950. George was a student in my class at that time. He has taken other courses with me and I have talked with him outside of class on a number of occasions.

2. How long has applicant resided in Cook County? Not known.

3. State any former residence of applicant, if known to you. Not known.

4. What is applicant's reputation as to honesty, integrity, and his general conduct? (Answer fully.) Very good! I know of no one who doubts his honesty and integrity. The only doubt as to general conduct arises as to this proceeding. Some say—as a matter of policy—he should have waived his point, and answered everything.

5. Was applicant ever arrested or indicted? Not known.

6. Was applicant ever a party to a law suit? Aside from this proceeding, I believe not.

7. Have you ever heard of any fact, rumor or charge reflecting upon applicant's reputation or character? No.

8. Was applicant, or either of his parents, alien born? Not known.

9. Have you ever heard any question raised as to applicant's adherence to and support of the principles of the Constitution of the United States? No, aside from this proceeding.

10. What have you observed applicant's moral influence upon others to be? Good. His fellow students respect his independence, and adherence to principle.

11. By what traits of mind and character do you consider this applicant fitted to practice law? He has a logical, even rigorous, turn of mind. He is quite tenacious of a point, when he thinks he is right. He is respectful of others.

12. Do you consider applicant worthy of the highest trust and confidence? Yes!
(for example, would you recommend him as the guardian of a minor's estate?) Yes!

(Please sign here) /s/ Roscoe T. Steffen

KINDLY RETURN PROMPTLY

[fol. 453] KINDLY RETURN PROMPTLY

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO 3

RICHARD H. CAIN
SECRETARY

November 1, 1957

[Stamp—Received Nov 6 1957 Char. & Fit. 1st Dist.]

Mr. Richard Weaver
The College
University of Chicago
Chicago, Illinois

Dear Sir:

George Anastaplo has applied for admission to the Bar of the State of Illinois. He has given this Committee your name as a reference regarding his moral character and general fitness to practice as an attorney and counsellor at law. Your answers to the following questions will be appreciated by the Committee. If any of your answers are not based on personal knowledge, please state the source of your information.

/s/ R. H. CAIN, Secretary.

1. State fully how long you have known the applicant and how intimate your acquaintance with him has been. Since the spring of 1948. I have talked with him at fairly frequent intervals on the campus of the University of Chicago.
2. How long has applicant resided in Cook County? .....
3. State any former residence of applicant, if known to you. .....

4. What is applicant's reputation as to honesty, integrity, and his general conduct? (Answer fully.) I have never heard anything that would reflect on these. In his dealings with me, he has been perfectly punctual and honest.

5. Was applicant ever arrested or indicted? I do not know this.

6. Was applicant ever a party to a law suit? I do not know this.

7. Have you ever heard of any fact, rumor or charge reflecting upon applicant's reputation or character? No

8. Was applicant, or either of his parents, alien born? .....

9. Have you ever heard any question raised as to applicant's adherence to and support of the principles of the Constitution of the United States? Please see reverse side of sheet.

10. What have you observed applicant's moral influence upon others to be? Excellent as far as I have observed.

11. By what traits of mind and character do you consider this applicant fitted to practice law? Unusual intelligence, fairness, and personal modesty

12. Do you consider applicant worthy of the highest trust and confidence? Yes
(for example, would you recommend him as the guardian of a minor's estate?) Yes

(Please sign here) /s/ Richard M. Weaver

KINDLY RETURN PROMPTLY

[fol. 454] [Reverse side]

I have heard that this question was raised some years ago in connection with his application for admission to the bar. It has surprised me, however, that this should have happened. I have never seen any sign that Mr. An-

astaplo harbors ideas of an unpatriotic tendency, and I am thinking of patriotism here in the old-fashioned sense. He has always seemed to me too keen and too independent a thinker ever to allow himself to be committed to a radical program. My own publications have often been attacked for their conservatism, but I must say that Mr. Anastaplo has shown a better and a more sympathetic understanding of the point of view expressed in them than the vast majority of students I meet. Everything I know about the applicant leaves me feeling that he is an unusually intelligent, balanced, and helpful American citizen.

[fol. 455] KINDLY RETURN PROMPTLY

COMMITTEE ON CHARACTER AND FITNESS
OF APPLICANTS FOR ADMISSION TO THE BAR
FOR THE FIRST APPELLATE COURT DISTRICT
1140, 29 SOUTH LA SALLE STREET
CHICAGO 3

RICHARD H. CAIN
SECRETARY

November 1, 1957

[Stamp—Received Nov 11 1957 Char. & Fit. 1st Dist.]

MR. Yves R. Simon
820 N. Notre Dame Ave.
South Bend, Indiana

Dear Sir:

George Anastaplo has applied for admission to the Bar of the State of Illinois. He has given this Committee your name as a reference regarding his moral character and general fitness to practice as an attorney and counsellor at law. Your answers to the following questions will be appreciated by the Committee. If any of your answers are not based on personal knowledge, please state the source of your information.

/s/ R. H. CAIN, Secretary.

1. State fully how long you have known the applicant and how intimate your acquaintance with him has been. I have known Mr Anastaplo for a couple of years. The tutorial method used in our Com. on Social Thought makes for close relationship to our students. I think that I know him well
2. How long has applicant resided in Cook County? ——
3. State any former residence of applicant, if known to you. ——
4. What is applicant's reputation as to honesty, integrity, and his general conduct? (Answer fully.) I consider Anastaplo as a young man of the most distinguished and lofty moral character. Everybody respects him and likes him.
5. Was applicant ever arrested or indicted? ——
6. Was applicant ever a party to a law suit? ——
7. Have you ever heard of any fact, rumor or charge reflecting upon applicant's reputation or character? emphatically: no
8. Was applicant, or either of his parents, alien born? ——
9. Have you ever heard any question raised as to applicant's adherence to and support of the principles of the Constitution of the United States? no
10. What have you observed applicant's moral influence upon others to be? excellent
11. By what traits of mind and character do you consider this applicant fitted to practice law? Intelligence, conscientiousness, sincerity, integrity
12. Do you consider applicant worthy of the highest trust and confidence? yes
    (for example, would you recommend him as the guardian of a minor's estate?) sure!

(Please sign here) /s/ Yves R. Simon

Professor of Philosophy,
Committee On Social Thought,
The University of Chicago, Chicago, 37, Ill.

KINDLY RETURN PROMPTLY

[fol. 456]

COPY

23 November 1957

Mr. Richard H. Cain, Secretary
Committee on Character and Fitness
29 South LaSalle Street
Chicago 3, Illinois

Dear Mr. Cain:

If I can do so without interfering with the present plans of the Committee for scheduling my hearing before them, I should like to add two items to the information submitted October 16.

1. Inadvertently omitted from my questionnaire was the fact that I attended the Sorbonne in Paris, from February to July 1951, taking courses in French language and culture.

2. Also omitted was the fact that I was awarded in 1956 a Business Fellowship by the Foundation for Economic Education. This fellowship permitted me to spend six weeks in New York that summer studying the activities and problems of the management of Socony Mobil Oil, Inc.

Respectfully yours,

George Anastaplo

[fol. 457]

COPY

6026 Ellis Avenue
Chicago 37, Illinois

March 28, 1954

The Editor
The New York *Times*
Times Square
New York, New York

Dear Sir:

It is often a source of immediate satisfaction to be able to deny to a person the rights and privileges he would and does deny to others. I am sure, therefore, that many have read with approval editorials in various newspapers advocating that Senator McCarthy be denied the privilege of cross-examining the Army witnesses that will soon appear against Mr. Cohn and the Senator.

But, I venture to suggest, this kind of satisfaction and approval is short-sighted and self-defeating. Whatever the values of cross-examination in the process of seeking the truth and promoting justice in any proceeding, they are values that make cross-examination particularly desirable in this proceeding also.

We should avoid the temptation, therefore, to do to others as they would do to us. The resistance of enough such temptations could prove an important contribution to the establishment of a saner and healthier atmosphere on the American political scene today.

Respectfully yours,

George Anastaplo

NOTE: I should like to see this printed, in its entirety, as a letter to the Editor. Thank you.

[fol. 458]

COPY

1465 East 54th Place
Chicago 15, Illinois

5 August 1952

The Editor
The Chicago Daily News
Chicago, Illinois

Dear Sir:

In regard to the present controversy over whether Chicago policemen should be required to cooperate with an income inquiry, I would like to submit the following analysis for consideration.

The Chicago Bar Association conceded last week that such an inquiry would ordinarily be considered an infringement upon the citizen's constitutional rights. But, they continued, policemen cannot stand upon such rights and remain policemen since it is against the public interest. This type of argument has been used to justify the negation of some of the constitutional rights of government employees, scientists, lawyers and military personnel, among others, with the result that over ten million of our sixty million labor force have become fair game for those who would, in the name of a sometimes capricious public interest, affidavit away our problems.

There is an alternative to the oftentimes illusory effectiveness of an investigating committee employed in the proposed manner. Crime, corruption, sabotage or espionage—these current threats to the public interest—can properly be the target of intensive police methods or, if need be, of a special assistant to the State's Attorney. If there are inquiries and charges to be made of specific persons who may be regarded as suspects, grand juries and indictments are still available. Of course, this would take longer, cost more and perhaps be less effective. But these are risks and costs we should be willing to accept that we might avoid the even more severe cost of inroads upon the dignity and

rights of those who are to be prohibited, as a condition for serving their community, from "hiding" behind constitutional privileges.

It has been said that those who fall within these vulnerable groups should be willing to give up certain constitutional rights as a prerequisite for employment. But it should be obvious that these positions have to be filled today by someone and it is important that proper prerequisites be required if there is not always to be a substantial number of citizens with significant disabilities. Furthermore, these [fol. 459] positions concern functions that contribute much to the implementation of the constitutional rights of all. There is something self-defeating in the practice that would disqualify as unfit for such positions all those who demand for themselves the constitutional rights acknowledged as belonging to all other citizens.

Respectfully yours,

George Anastaplo

NOTE: Although this letter might be considered rather long, I wish you would publish it in its entirety or not at all.

[fol. 460]

Text of two letters by George Anastaplo to a member of the Supreme Court of Illinois. The letters discuss the "character and fitness" inquiry which is part of the Illinois bar admission procedure. The first, from Paris, bears the date, May 6, 1955; the second, from London, July 14, 1955.

I.

I should like, now that litigation with respect to my bar admission matter has drawn to a close, to offer a few suggestions to the Court about possible improvements in the handling of character and fitness matters in Illinois. Although I am not, as you know, a lawyer, I hope that my own experiences may be of some value should the Court review the present rules. Since, as I have noted, my own efforts

to secure admission are at an end. I trust that these suggestions will be taken as those of one who has no other interest than that of making a contribution toward the improvement of the administration of justice in the State of Illinois.

Perhaps it would be appropriate to observe that it seems to me particularly in the interest of the Illinois bar, as well as to the Court, to insure the highest standards with respect to both the procedural and substantive aspects of the conduct of bar admission matters. The applicant for admission is often introduced to the operation of the law in his application. And it is well to remember that he is likely to be a person who, at the outset of his career, is without the financial resources that are needed to carry on sustained and uncertain lawsuits. It seems desirable, therefore—not only for the protection of the individual but also for the effect on his classmates and the younger members of the bar who have much to learn from the behavior of their elders in the profession—that the bar admission practices and procedures should be a model of fairness and simplicity.

I regret to suggest, however, that the behavior of the Committee on Character and Fitness in my matter left much to be desired along these lines. The lack of any findings and the refusal to state any rationale for its decision were only two of the more severe handicaps confronting me. It may have seemed to some members of the Committee that they should make review of their decisions as difficult as possible. It would seem that the Court's decision to review the action of the Committee repudiated what I take to have been an unlawyerlike attitude.

Although you may be already familiar with this material, I am enclosing for your consideration Rule 3, Rules of the Supreme Court of Indiana, 1954 edition (with amendments (of) February 15, 1954), relating to "Rules for Admission to the Bar and Concerning Attorneys." I should like to call your attention, in particular, to sections 3-12 and 3-13A, [fol. 461] where definite methods of appeal are provided. Although not clearly provided for, it seems within the spirit of these rules that "the finding and recommendation

and all papers filed in connection therewith," which are forwarded from the Character Committee to the State Board of Law Examiners for review, are made available to the applicant also. (Thus, it is later indicated that "the substance of the matters to be inquired into" by the State Board of Law Examiners on review shall be made known to the applicant.) The contrast with my situation is, of course, quite striking, not only because I was unable to secure findings and rationale at the time of the Committee decision but also because of the refusal of the Committee to include in the record the Investigator's report which probably included a highly favorable report based on interviews with fellow townspeople I had known for two decades. It would seem only fair that provision be made against the repetition of such behavior.

These Indiana rules suggest to me the kind of refashioning of the Illinois rules that would be beneficial. This is not to say, of course, that the Indiana rules are above improvement. One vital area with respect to which the supreme court of a state should have some control is that of the subjects about which character committees examine applicants. In my own matter, for instance, the Committee evidently felt free to question about whatever it pleased. I have argued in my briefs—and I suspect that the Committee realized this after it had committed itself to the judgment of its more excitable members—that no questions about affiliations (into the Communist Party, the Ku Klux Klan, etc.) would have been asked if I had not given the "wrong" answers about *whether* members of the Communist Party should be permitted to practice law and about the "right of revolution." At no time has a serious attempt been made by the Committee to explain or justify why applicants for admission to the bar should be greeted, at their oral character examinations, with inquiries about whether they believe members of the Communist Party should be permitted to practice. No attempt has been made, that is, to suggest why the opinions of applicants on such controversial matters should be inquired into and should serve as the basis, when the "wrong" answer is given, for questions about affiliations to various organizations. Furthermore, no attempt has been made to explain why questions about

affiliations should be insisted upon, and advanced as justification for exclusion, when there is absolutely no evidence in the record suggesting the existence of any of the affiliations inquired about.

It is not my intention here to develop again the arguments I have made in this case—the Jurisdictional Statement and Petition for Rehearing submitted to the Supreme Court of the United States should serve as adequate enough summaries for the moment. I should only like to suggest here not that my arguments and analyses were necessarily cor-
[fol. 462] rect but rather that the areas inquired into by the Committee were of such a controversial and ambiguous nature that some kind of restriction should be incorporated into the rules about them. I should think that the least that might be done would be a prohibition of questions requiring opinions on political and religious problems. Since I believe, furthermore, it will become increasingly evident to thoughtful members of the Illinois bar that, the litigated questions of constitutional law aside, the Committee's action in my matter was most questionable, I would suggest that it would be well to analyze carefully the record in that case with a view to correcting the rules that permitted such action.

I should also like to include among my suggestions one with respect to the financing of the review of these matters. I have already referred to the limited resources usually available to an applicant who has just spent several years in law school. Thus, a prudent applicant might have the prosecution of an uncertain appeal delayed not only by the lack of findings but also because he feels obliged to wait until he becomes financially able to sustain what could be expected to become an involved and drawn out lawsuit. I suggest that this Court consider providing some way whereby an applicant, without being obliged to declare himself a pauper, might have his reasonable expenses of litigation furnished. Perhaps the Canadian bar admission case of *In re Martin*, cited by the Committee in its report and by the Court in its opinion on another point, is instructive in this and other respects relating to financing and procedure.

I should like to stress once again, particularly since I have raised the problem of financing, that I am not writing in

the capacity of an applicant for admission to the Illinois bar but rather as one interested in worthwhile amendments to the rules of the Court. Lest it be thought that my arguments for the need for such amendments are adequately refuted by the fact that review *was* accorded in my matter, I should observe that it cannot be expected that many more applicants will be as determined as I have been to protect what I took to be my rights and to resist what I took to be the misconduct of the Character Committee. I do not believe that the Court can reasonably expect many more applicants to sacrifice their careers at the bar in the hope that they might be able to bring to the Court's attention the behavior of its Committee. I should think, therefore, that appellate procedures should be as clear, simple and adequate as possible, in order to facilitate judicial review, perhaps even review of a declaratory judgment nature.

In closing, I should like to offer once again, as I did in the brief submitted in September 1958, to make available to the Court any other suggestions that it might want to receive. Since this letter is, in large part, (a discussion which [fol. 463] uses as its point of departure) the enclosed rules of the Indiana Supreme Court, I have devoted most of my space to procedural considerations and have only touched upon what I would call the "substantive" problems. I hope that the Court will feel free to call upon me for any services I might be able to render it.

I also hope that what I have said here is of some use to you and that it is received in the spirit in which it is sent. I trust that I have been able, both here and in the various documents filed during the course of this litigation, to present my thinking in good faith and to keep that thinking on the highest possible plane consistent with good advocacy.

I trust also that no disrespect to the Court is read into my assumption that the positions I have maintained the last five years will eventually be vindicated. My confidence on this score, however, does not make me any the less desirous of seeing some benefit accrue immediately to the Illinois bar from my experiences. It is for this reason that I have taken the liberty of writing at this time.

II.

. . . I had not planned to write until I returned home later this month. But it has seemed increasingly possible in recent weeks that, if I am to be able to provide realistically for the future, I might have to remove myself from Illinois upon my return. Since my interest in the Court's methods and standards may seem less appropriate in one writing from another state, I should like (while I still have a Chicago address) to add a few more suggestions to those in my last letter.

My thinking, with respect to the heart of the character and fitness problem, tends along what may seem, at first sight, radical lines. But it should be remembered that, in the history of the bar, the institution of the character committee is relatively new. Thus, in a sense, this institution is itself a radical development that courts (exercising their extensive rule-making powers) can evaluate and reshape in terms of a tradition, of both independence and responsibility, that the bar should wish to see preserved among its members.

Perhaps one of the most troublesome aspects of official thinking in this area is seen with respect to the question of the burden of proof. It is easy enough to answer, as do most if not all of the courts and character committees in the United States, that the applicant for admission has the burden. But there is little or no protection for the applicant who faces an unsympathetic committee.

[fol. 464] For, from the nature of things, the possession of satisfactory character and fitness is difficult to demonstrate to a critical stranger. This possession is something which may be known by a great many familiar with an applicant but which can be "proved" by few. Perhaps the simplest solution—if the existence of character committees is accepted—would be the acknowledgment of a general presumption of satisfactory character and fitness, a presumption that a committee might challenge with respect to a particular applicant by bringing forward particular complaints and facts. This suggestion is said to be overridden, I know, by the insistence of court and bar that they must be "sure" about each applicant, no matter how harsh this might be in particular instances, and that the applicant,

therefore, must do what he can to persuade the committee as to his eligibility.

Perhaps a rough compromise between these two positions can be found in a formula which creates a presumption of satisfactory character and fitness for the applicant who has in his record indications that he has been tested by one or another of certain other institutions of society: these indications could include a degree from an acceptable university or law school, honorable service in the armed forces, membership in good standing in the bar of another jurisdiction, or the holding of public office on the local government level.

Information of this kind, as distinguished from inquiries about possible memberships in political and religious organizations, is already requested on the questionnaire of the Chicago character committee. But positive information of this kind should, I suggest, create a presumption of satisfactory character and fitness, a presumption which the committee could then attempt to challenge by advancing reasons why it should not be controlling in a particular case. This suggestion is related, by the way, to the comments in my last letter about the designation both of topics to be discussed at hearings and of the "charges" made against applicants.

This is not to claim that the risk of arbitrariness and error on the part of character committees would be eliminated under this approach: such risk must always be expected where human institutions operate. But what I suggest would offer considerable protection to applicants and would provide a practical guide, both with respect to hearings and appeals, to the committee as well as to the applicant. Problems would, of course, remain. I would not, for instance, be taken as suggesting that a conscientious objector to military service is to be penalized—for such a person may, in certain circumstances, be displaying a degree of fitness superior to that of the average candidate. Nor do I suggest that the man who acquires his training in a law office is to be slighted—for such a person may have displayed a high order of perseverance and devotion to the law in proceeding as he has (perhaps a certificate from the lawyer with whom he has worked should serve to create a

presumption with respect to such an applicant.) What I [fol. 465] do suggest is the acknowledgment of a fact, the fact that applicants are tested, much more adequately than committees can hope to, by various institutions in our society. (This approach, I should add, means much more than putting to applicants questions as to the political or religious organizations to which they might or might not belong, questions which may or sometimes should go unanswered for a number of reasons.)

Nor do I wish to seem to ignore certain problems such as the "certification" of various institutions as "representative" of society. I would not wish to see imposed upon the committees or the courts any additional burdens: but it is known that law schools, for instance, are rated by organizations such as the American Bar Association. Problems would still remain, of course, but they would be different problems (from) those with respect to a particular unknown and often helpless applicant about whom little of value can be learned anyway in the usual hearing. I suspect, in fact, that general agreement could be quite easily reached as to the type of previous activity and attainments which would create the presumption of which I speak. I trust, by the way, that it is no valid argument against a proposal that it incorporates an attitude which regards the bulk of applicants as presumptively eligible for admission to the bar: practically speaking, character committees so regard, without appreciating the rationale, the usual applicant who comes before them so long as he tells them only what they want to hear.

The attitude recommended here, whereby the credentials of other institutions are respected, would serve to contribute to the dignity of the bar as a profession and would encourage a reciprocal attitude among other groups in a society that is sometimes inclined to ignore tradition and to disparage its own experience. Thus, a profession which trusts others and displays self-restraint gives the best possible testimony as to its own worth and integrity (especially when this attitude is coupled with a strict adherence to the canons of ethics by those within the bar.) The alternative is an attitude of distrust and caprice that leads to the cheapening

of the credentials of all, making us all strangers to one another.

Perhaps it is along these lines that there can be a practical resolution of the contending positions in this area. If the Court should like, I could develop further the ideas here sketched. In any event, I hope I may be able on occasion to return to the field of law with suggestions for your consideration and that my credentials are such that I come not altogether as a stranger. . . .

[fol. 466]

REMARKS BY GEORGE ANASTAPLO PREPARED FOR PRESENTATION TO THE COMMITTEE ON CHARACTER AND FITNESS AT THE BEGINNING OF THE MEETING OF APRIL 7, 1958.

Commissioner Stephan, in the closing minutes of our meeting of March 21, described a member of the Communist Party as someone who, in his opinion, believes in certain bad doctrines and goals. In response to questions, I expressed the opinion at the time that I did not believe membership in that organization was in itself enough to disqualify an applicant for admission to the bar. Among the reasons for my opinion, one could note the following:

1. Mr. Stephan's description of the doctrines and goals of the organization may be incorrect. Certainly, it is not authoritative or binding in a particular bar admission case.

2. The particular bar applicant, even though a member, may not know of the doctrines and goals of the organization that Mr. Stephan finds vulnerable. He may simply think Mr. Stephan is wrong, even though he is right.

3. Even if he knew of those doctrines and goals, he himself may never have endorsed them. He might think, for instance, that membership in the organization is desirable or patriotic in spite of these doctrines. Consider the case of a liberal Northern democrat voting for and supporting a Southern presidential or vice-presidential candidate of his party.

4. Even though the bar applicant endorsed such doctrines and goals as Mr. Stephan describes, he may view them in a

significantly different way than does Mr. Stephan. In fact, these things may be of such a theoretical nature as to have no immediate practical bearing on the man's behavior or on a realistic evaluation of his character and fitness. Related to this point is the doctrine known as "the clear and present danger test."

5. In addition, it is far from clear that Mr. Stephan's items are anything other than ideas protected by the First Amendment against state attack. These doctrines, moreover, may be the most insignificant part of the Communist Party member's workaday world. Consider again the implications to constitutional representative government of a belief in the Kingdom of God.

6. Finally, there may be no safe stopping-place once you start inquiries about such organizations of a political or quasi-political nature, especially when the emphasis is placed as Mr. Stephan has placed it, on a member's belief in doctrines and goals. That is, the constant risks run in trying to punish for their beliefs applicants who belong to certain organizations may not be worth the gains the bar may only occasionally, if ever, enjoy from such an approach. Does not the effectiveness of this approach depend, moreover, on the sincerity and good faith and cooperation of the applicant involved?

Still, Mr. Stephan could be right; I could be wrong. I have been wrong before. I trust the Committee also take into account the human limitations to which they are also liable. Perhaps membership in such an organization as the Communist Party should be conclusive or almost conclusive adverse evidence in a bar admission case. But the fact that I may be wrong in a difference of opinion with Mr. Stephan or any other member of the Committee says nothing adverse about my character and fitness, no matter how much you may disagree with me. Conversely, if I am correct in my opinion that membership in organizations such as the Communist Party or the Ku Klux Klan is not under the [fol. 467] Constitution or even logically conclusive or almost conclusive adverse evidence with respect to membership in the bar, then Mr. Stephan's character and fitness do

not become suspect because he is wrong in his opinion to the contrary.

So, the difference of opinion we have had is irrelevant to a consideration of character and fitness, except to the extent that a willingness to defend an unpopular position may provide evidence that one has the attitude that a lawyer is sometimes called upon to display in expressing his convictions even against the intimidations of authority and public opinion.

Let us assume for the moment, however, that I am wrong about whether *evidence of membership* in certain organizations could in itself be conclusive or almost conclusive adverse evidence. It seems to me it would still be necessary for the Committee to show that *inquiries* with respect to a particular organization are important in *my* matter. A refusal to answer such inquiries on constitutional grounds is, of course, absolutely no evidence of membership: it creates no presumption at all with respect to membership. Why then are these inquiries now said to be important in my matter?

It would not be enough simply to say that any inquiry is important which an applicant has refused to answer. The Committee does not make that claim. In fact, it explicitly denies it, or at least Mr. Stephan does. There are a half-dozen other organizations, including the Ku Klux Klan and the Silver Shirts of America, that have been asked about in this rehearing with as much emphasis at the time of asking as the Communist Party question. These are questions which I refused to answer for the same reasons I have not spoken as to Communist Party membership possibilities, and for which there is as much evidence and foundation in the record as for the Communist Party question—that is, absolutely none.

Is there any reason then for selecting the unanswered question about the Communist Party for special attention at this stage of the rehearing?

Commissioner Stephan made an attempt, at page 117, to justify the emphasis now placed upon the Communist Party question by pointing to the history of this case. I question,

first of all, however, whether that history should take precedence for the Committee over the Supreme Court order designating the areas of inquiry for this rehearing. The Supreme Court order, as I have shown, implicitly rules out the very inquiries Mr. Stephan now tries to emphasize. Furthermore, the history of this case, if carefully read, reveals that inquiries into affiliations came only after and only because of my expression of certain unpopular but perfectly respectable and legitimate opinions on other matters. In addition, a reference to the history of the case only pushes the need for justification further back in time: the history of the case is filled with the most drastic violations of elementary rules about due process, relevance, the laying of foundation for unusual inquiries, the significance of evidence—the same kinds of violations that we are seeing in this rehearing and against which I have lodged several objections under the federal constitution. Thus, the problem [fol. 468] becomes why inquiries into affiliations were ever made in my bar admission matter. Finally, the history of the case is not a sufficient justification for Mr. Stephan's emphasis inasmuch as there are in the previous case unanswered questions about membership in the Ku Klux Klan as well as the Communist Party. Again, I ask, on what basis can the Committee now select the Communist Party questions for special emphasis at this time? I submit that no valid answer to this vital question has been given, a vital question under the Constitution of the United States as well as logically.

Yet I am told that the inquiry about the Communist Party may be crucial. This is done despite the fact, which I take it the Committee may be willing to admit and which Mr. Stephan carefully skirted in his exposition, that there is no adverse evidence at all on that point in the record. This is done despite the implications of my testimony on February 28 that a member of the Supreme Court of Illinois which reviewed my case in 1954 has since told me, "No one ever thought you were a Communist."

Thus, the bearing of this question about the Communist Party on my matter is in no way indicated. All I have instead is Mr. Stephan's personal dissertation about the doc-

trines and goals of the Communist Party and why he is opposed to it. For all you know, I may be opposed to it for the same reasons. But that is not the issue here. Mr. Stephan is dubious, to say the least, about the qualifications of a Communist Party member because that member's goals and doctrines probably include, among others,

1. putting an end to representative government;
2. putting an end to civil liberties;
3. destroying constitutional government.

As between the Committee and me, who has stood firmest for constitutional government, for the rule of law, for civil liberties? Who has not only spoken for these principles but made sacrifices on their behalf? Have I not exhibited enough of a commitment to these principles to make unnecessary and presumptuous any attempt to check up on me indirectly with inquiries about affiliations? Have I not shown that my entire position before the Committee is based on these principles, principles which I have spelled out in detail for many years now? Have I not already demonstrated a strong enough attachment to constitutional law, to the rule of law, and to civil liberties? If Mr. Stephan is correct in his description of the goals of the Communist Party, I suggest that this Committee, in the way it has handled my application for admission the past eight years, has served admirably the goals of Mr. Stephan's Communist Party.

Permit me to go one step further. Let us assume that despite the considerable evidence in the record on my behalf, despite the lack of any foundation or evidence with respect to Communist Party affiliations, despite all the constitutional objections I have raised—let us assume that, despite all this, the question about Communist Party membership is relevant and that the Committee has the right to ask it. What if an applicant still refuses on principle to answer it? What is the evidentiary significance *in this record* and for character and fitness purposes of an honest and sincere reluctance to answer a particular question? Does not the Committee have more than enough evidence

and reason to certify me for admission, however mistaken I may be in now answering a question which I consider un- [fol. 469] constitutional, unfounded, dangerous, insulting and irrelevant to the issues? Whatever the merits of Mr. Stephan's dissertation about the significance in bar admission matters of evidence of membership in the Communist Party, that dissertation has little bearing on the evidentiary significance of a principled refusal to testify about such membership. Furthermore, what does it mean about the good faith of the Committee that a question is now emphasized the answer to which, as I demonstrated in my testimony of February 28, the Committee has little if any doubt about, anyway.

I should like to insist once again that the speculations we have heard so far about the Communist Party have been highly theoretical with no bearing on this case. I agree that if members of the Committee want to engage in theoretical discussions in political science about Communism and class warfare and the abolition of the state, they are of course free to do so under the Constitution. But I do wish they would not do so in this forum and at my expense. The issue here is none of these things—not Communism, not the Ku Klux Klan, not the Silver Shirts of America, not the abolition of the state, not class warfare, not the dictatorship of the proletariat, and not the Kingdom of God. The issue here, I should like to remind the Committee, is my character and fitness. These theoretical discussions, into which I am very reluctantly drawn in this forum, only generate excitement and hostility that obscure the main issue *in this case.*

I, of course, cannot prevent members of the Committee from putting on record their opinions on these theoretical matters. But I *can* point out that these theoretical matters have absolutely nothing to do with the matter before you, that is, the question of my qualifications to practice law.

Some of you have expressed concern from time to time about the abolition of constitutional government and the establishment of a tyranny in our country. Suppose that

were to happen. Who among us would most likely be so foolish as to insist on independence of judgment, even in the face of hostile state authorities? Who has indicated a willingness to take seriously and to defend the principles of the American Constitution and the American political system against misguided attacks and encroachments?

Assume again that the Communist Party, the Ku Klux Klan, and the Silver Shirts of America are, in this country, as evil as they have ever been described by their most bitter critics. I submit that my defence of the rule of law, of constitutional government, and of the role of personal judgment and integrity in the political sphere constitutes a much greater opposition to such organizations as you describe them to exist than anything that I have ever known this Committee to do.

Let me urge you once again to forego theoretical dissertations and to concentrate on the relatively simple purpose for which this Committee exists. A good place to start might be the character recommendations submitted directly to the Committee by a group of distinguished and responsible Americans whose judgments must be taken seriously if the Committee respects its procedures and standards.

[fol. 470] Three statements reflecting applicant's position with respect to the "right of revolution".

1. From The Declaration of Independence of the United States, In Congress, July 4, 1776.

"The unanimous declaration of the thirteen united states of America.

"When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life,

Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security . . . "

2. From The First Inaugural Address of President Lincoln, at Washington, D. C., March 4, 1861.

" . . . All profess to be content in the Union, if all constitutional rights can be maintained. Is it true, then, that any right, plainly written in the Constitution, has been denied? I think not. Happily the human mind is so constituted, that no party can reach to the audacity of doing this. Think, if you can, of a single instance in which a plainly written provision of the Constitution has ever been denied. If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution —certainly would, if such a right were a vital one. But such is not our case. . . . "

[fol. 471] 3. From Applicant's Supplementary Petition for Rehearing, Before the Committee on Character and Fitness in Chicago, June 25, 1957.

"Almost everyone would agree there are times when a government should be overthrown by force. Ultimately, a citizen has to decide for himself when such a time comes—

when the principles of The Declaration of Independence apply. The conscientious citizen reserves the right and duty to judge his government even as he takes the oath to support not that government but the Constitution. In fact, our Constitution can be said to have this right implicit in it, a right that protects the Constitution itself from subversion by a government that may be constitutional only in appearance. But, as I said when I first appeared before the full Committee on January 5, 1951, I do not think anyone would be justified at a time such as this, when the normal processes of government permit reasonable and peaceful change, to participate in action leading to the overthrow of government.

"The right of revolution, as I understand it, is something that probably all the members of the Committee on Character and Fitness and of the Supreme Court of Illinois believe in. The Committee must realize that I would be no less reluctant than they to see this right of revolution exercised except in the most extreme circumstances. I trust that my position, and what I have contributed to its defence, indicate an abiding commitment to constitutional government."

0-0-0-0-0

[fol. 472] Passages from two authors which speak to the problem of the "right of revolution," particularly with respect to the exercise of prudence and judgment relating thereto.

1. From St. Thomas Aquinas, *Summa Theologica* (*a.* Question 42, Article 2; *b.* Question 96, Article 4).

(a) Tyrannical government is unjust government because it is directed not to the common welfare but to the private benefit of the ruler. This is clear from what the Philosopher [Aristotle] says in the *Politics,* Book III, and in the *Ethics,* Book VIII. Consequently the overthrowing of such government is not strictly sedition; except perhaps in the case that it is accompanied by such disorder that the community suffers greater harm from the consequent disturbances than it would from a continuance of the former rule. A tyrant himself is, in fact, far more guilty of sedition when he

spreads discord and strife among the people subject to him, so hoping to control them more easily. For it is a characteristic of tyranny to order everything to the personal satisfaction of the ruler at the expense of the community.

(b) . . . Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived, according to Prov. vii. 15: By Me kings reign, and law-givers decree just things. Now laws are said to be just, both from the end, when, to wit, they are ordained to the common good, —and from their author, that is to say, when the law that is made does not exceed the power of the lawgiver,—and from their form, when, to wit, burdens are laid on the subjects, according to an equality of proportion and with a view to the common good. For, since one man is a part of the community, each man, in all that he is and has, belongs to the community; just as a part, in all that it is, belongs to the whole; wherefore nature inflicts a loss on the part, in order to save the whole: so that on this account, such laws as these, which impose proportionate burdens, are just and binding in conscience, and are legal laws.

On the other hand laws may be unjust in two ways: first by being contrary to human good, through being opposed to the things mentioned above:—either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory;—or in respect of the author, as when a man makes a law that goes beyond the power committed to him;—or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws; because as Augustine says (*De Lib. Art.* i. 5), a law that is not just, seems to be no law at all. Wherefore such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right, according to Matth. v. 40, 41: If a man . . . take away thy coat, let go thy cloak also unto him; and whosoever will force thee one mile, go with him another two.

[fol. 473] Secondly: laws may be unjust through being opposed to the Divine good: such are the laws of tyrants inducing idolatry, or to anything else contrary to the Divine law: and laws of this kind must nowise be observed, because, as stated in Acts v. 29, we ought to obey God rather than men.

2. From The Presidential Protest Speech of Daniel Webster, in the Senate of the United States, May 7, 1834.

. . . It was strongly and forcibly urged, yesterday, by the honorable member from South Carolina, that the true and only mode of preserving any balance of power, in mixed governments, is to keep an exact balance. This is very true, and to this end encroachment must be resisted at the first step. The question is, therefore, whether, upon the true principles of the Constitution, this exercise of power by the President can be justified. Whether the consequences be prejudicial or not, if there be an illegal exercise of power, it is to be resisted in the proper manner. Even if no harm of inconvenience result from transgressing the boundary, the intrusion is not to be suffered to pass unnoticed. Every encroachment, great or small, is important enough to awaken the attention of those who are intrusted with the preservation of a constitutional government. We are not to wait till great public mischiefs come, till the government is overthrown, or liberty itself put into extreme jeopardy. We should not be worthy sons of our fathers were we so to regard great questions affecting the general freedom.

Those fathers accomplished the Revolution on a strict question of principle. The Parliament of Great Britain asserted a right to tax the Colonies in all cases whatsoever; and it was precisely on this question that they made the Revolution turn. The amount of taxation was trifling, but the claim itself was inconsistent with liberty; and that was, in their eyes, enough. It was against the recital of an act of Parliament, rather than against any suffering under its enactments. They fought seven years against a declaration. They poured out their treasures and their blood like water, in a contest against an assertion which those less sagacious and not so well schooled in the principles of civil

liberty would have regarded as barren phraseology, or mere parade of words. They saw in the claim of the British Parliament a seminal principle of mischief, the germ of unjust power; they detected it, dragged it forth from underneath its plausible disguises, struck at it; nor did it elude either their steady eye or their well-directed blow till they had extirpated and destroyed it, to the smallest fibre. On this question of principle, while actual suffering was yet afar off, they raised their flag against a power, to which, for purposes of foreign conquest and subjugation, Rome, in the height of her glory, is not to be compared. . . .

[fol. 474]

COPY

6030 Ellis Avenue
Chicago 37, Illinois

15 April 1958

Mr. Richard H. Cain, Secretary
Committee on Character and Fitness
29 South LaSalle Street
Chicago 3, Illinois

Dear Mr. Cain:

I realize that the law review article by Mr. John Starrs, "Considerations on Determination of Good Moral Character," University of Detroit Law Journal, March 1955, submitted in the closing minutes of our meeting of April 7 is rather lengthy for reproduction and distribution to the Committee. Consequently, I am enclosing excerpts from Mr. Starr's article, which particularly relate to my own matter. Perhaps it would be more convenient to concentrate upon these excerpts, using the article as a whole for an understanding of the judgments made by the author about my matter. One of the values of this article, written by the chairman of a local committee on character and fitness in a neighboring state, is that Mr. Starrs represents the approach and standards the Committee might have applied to my matter if they had not been personally involved in it. I should like, in order that I may be clear and certain about the basis of the Committee's position to be informed more

clearly about the rationale for the emphasis by the Committee chairman upon certain unanswered questions. Several attempts have been made during our meetings of March 21 and April 7 to state that rationale (e.g., bottom, page 117, Transcript). It seems to me, however, that the claim I have made several times remains unchallenged: the questions about affiliations, answered or unanswered, came only after and only because I had upon request expressed certain respectable opinions about the right of revolution, opinions which induced members of the Committee to make the inquiries they did.

This relation between opinions expressed and affiliations inquired about is reflected in the fact that the chairman, at the close of the hearing of April 7, asked, after I had been examined at length about the right of revolution, whether I was a Communist. The only justification for and cause of that question were the opinions I had just expressed about the right of revolution. I believe there is illustrated here a sequence seen throughout the case and basic to the issues here. Thus, the inquiries made of me and actions taken against me result from my opinions about the right of revolution.

In short, I submit to the Committee for their correction my conclusion that the basic issue continues to be whether someone who defends the principles of the Declaration of Independence is eligible for admission to the Illinois bar. I should like to request again that I be advised in advance the subjects to be discussed at our next meeting, so that I can prepare myself properly.

Respectfully yours,

George Anastaplo

[fol. 475]

COPY

COMMITTEE ON CHARACTER AND FITNESS

[Letterhead]

April 16, 1958

Mr. George Anastaplo
6030 Ellis Avenue
Chicago 37, Illinois

Dear Mr. Anastaplo:

I have your letter of April 15 in which you enclosed excerpts from a Law Review article written by Mr. John Starrs. We have already reproduced the entire Law Review article and it has been circulated among the members of the Committee.

I will refer your letter to the Chairman of the Committee so that he will be apprised of your request to be advised in advance of the next meeting on the subjects to be discussed at the meeting.

Sincerely,

Richard H. Cain
Secretary

RHC:ml

[fol. 476]

COPY

THE CARTERVILLE (Illinois) HERALD, October 1, 1954.

SUPREME COURT DENIES GEO. ANASTAPLO RIGHT TO BAR

The Supreme Court of the State of Illinois confirmed last week the finding of the Bar Association in denying Geo. Anastaplo admission to the right to practice law in Illinois. Unless Anastaplo appeals this to the U. S. Supreme Court, this is the conclusion.

Anastaplo, a high ranking student in high school here, and almost at the top of his class at the University of Chicago,

took the grounds that the Bar Association of Illinois had no right to ask him if he were a Communist or member of the Ku Klux Klan. He had subscribed to the oath willingly to support the constitution. He is an ex-service man and saw service as a navigator for bombers in the area around Africa.

Those who know George are quite certain that he is not a Communist and are doubly sure he never had anything to do with the Ku Klux Klan. He is of Greek [Orthodox] parentage. Rather, they think, that he feels they had no right to ask such questions, and rather than answer, would argue until the sun goes down.

This is round two of the legal battle, with George losing both, and round three, if coming to the U. S. Supreme Court, will make bigger headlines.

If George should win in his point of constitutional law that no one has the right to ask such questions, he will have made quite a reputation as a constitutional lawyer. If he loses, it will be other than the field of law for him.

[fol. 477]
I. F. STONE'S WEEKLY, March 7, 1955

at page 3:

Salute to a Hero

Last Monday, with Black and Douglas dissenting, the Supreme Court refused to hear the appeal of George Anastaplo, a World War II Air Force officer, who was denied admission to the bar in Illinois because (1) he refused on principle to say whether he was a Communist and (2) he insisted that people have a right to overthrow an oppressive government. The Court's action ends his ope of becoming a lawyer. Anastaplo, a man with the highest scholastic and character references, is a philosophical libertarian. One of his teachers said of him, "He has one of the two most brilliant minds I have ever taught. His moral standards are impregnable." His is the ancient breed of Patrick Henry and John Lilburne for which there is little place in the deadly conformity in cold war America.

[fol. 478]

COMMITTEE ON CHARACTER AND FITNESS

[Letterhead]

September 16, 1958

Mr. George Anastaplo
6030 Ellis Avenue
Chicago 37, Illinois

Dear Mr. Anastaplo:

At a meeting of the Committee on Character and Fitness held on September 12, I was instructed to call to your attention two recent decisions of the Supreme Court of the United States which may have some bearing upon your pending application for admission to the bar of this state. The cases are:

Beilan v. Board of Education of Philadelphia, 2 L.Ed. 2d 1414; and
Lerner v. *Casey,* 2 L.Ed. 2d 1423,

both of which were decided on June 30, 1958.

If you wish to comment on the above-mentioned cases will you kindly do so by written communication which should be delivered to the Secretary of the Committee on or before October 1. The Committee wishes to be advised whether, in the light of such decisions, you wish to change, modify or supplement any answers which you have given to the Committee's questions or alter your testimony in any other regard.

Very truly yours,

/s/ Richard H. Cain
Secretary

RHC:mf

[fol. 479]

6030 Ellis Avenue
Chicago 37, Illinois
September 23, 1958

Mr. Richard H. Cain, Secretary
The Committee on Character and Fitness
29 South LaSalle Street
Chicago 3, Illinois

Dear Mr. Cain:

I have your letter of September 16 advising me that the Committee has asked that there be called to my attention

> two recent decisions of the Supreme Court of the United States which may have some bearing upon [my] pending application for admission to the bar of this state. The cases are: *Beilan* v. *Board of Education of Philadelphia,* 2 L.Ed.2d 1414; and *Lerner* v. *Casey,* 2 L.Ed.2d 1423; both of which were decided on June 30, 1958.

It is suggested I might have a comment on these cases.

As the Committee must suspect, these are cases of which I must disapprove, even though they have nothing to do with admission to or membership in the bar. I am glad to see that in each of these cases there are four dissents, three of them expressed in strong terms, one of them by the Chief Justice.

The ruling of these cases is even more distressing in that it will encourage irresponsible and shortsighted officials to take action and do damage that the Court will be obliged to correct a few years hence. To discourage such irresponsibility, it is well to point out the limited scope of these two decisions and to emphasize that the recent passport cases and the cases relating to the California tax exemption oath (2 L ed 2d 1460), for instance, are much more in conformity with the general trend of decisions in recent years, as is the case of *N.A.A.C.P.* v. *Alabama* (2 L ed 2d 1488).

I gather that the Court has drawn back, if only temporarily and with strong dissents by eminent members, from extending to situations involving actual public employment

the protection recognized in the bar admission and Smith Act cases. The factor of public employment is reinforced in the *Beilan* and *Lerner* cases by evidence of "suspect" activities or memberships on the part of the employees. In each instance, the State claimed its inquiry about the qualifications of the employee for employment was being impeded by the employee's refusal to answer a particular question, a question that seems to have been prompted and perhaps made relevant or even necessary either by the information the State had as to the activities of the employee or by provisions in state laws authorizing or requiring such inquiries.

[fol. 480] It should be appreciated that the *Beilan* and *Lerner* cases really add very little to the law as it has been laid down by the Supreme Court of the United States since long before the *Konigsberg* and *Schware* cases. The Court, in the *Beilan* and *Lerner* opinions, relies for the most part on the cases of *Adler* v. *Board of Education*, 242 U.S. 485, and *Garner* v. *Board of Public Works*, 341 U.S. 716. These latter cases, involving *public employees*, were before the Court when it passed on the *Konigsberg* and *Schware* bar admission matters. I do not believe the Court even mentions the *Adler* and *Garner* cases in the *Konigsberg* and *Schware* opinions, a silence which suggests that we are dealing with two different lines of cases here, one relating to public employment, the other to bar admissions.

(The Committee can check the *Konigsberg* case briefs I have left with its chairman to see whether the California bar's briefs rely upon the *Adler* and *Garner* cases. My guess is that California did try to get the Supreme Court to see the *Konigsberg* problem in terms of the *Adler* and *Garner* public employment cases, but without success.)

It would seem, therefore, that the analysis of constitutional law I have made in the first part of my Closing Argument (pages 361-400) would still be applicable to my matter irrespective of the *Beilan* and *Lerner* cases. Permit me to urge the Committee to review this analysis and the parts of the Record cited at page 384. The Committee will find, I believe, that the position I have already set forth takes

account of the *Adler* and *Garner* public-employment cases, cases which are substantially the same as *Beilan* and *Lerner*.

To recapitulate, in the *Beilan* and *Lerner* cases, the Supreme Court seems once again to have emphasized the doctrine of the *Adler* and *Garner* cases that for a public employee to refuse to answer a question deemed relevant may justify dismissal.

The *Garland, Cummings, Schware* and *Konigsberg* decisions, on the other hand, indicate that different standards are called for when the area of public employment is left and that of bar admission is entered. Similarly, the Committee has acknowledged that a refusal to answer inquiries deemed relevant at one time or another in the course of a bar admission proceeding is not, in itself, sufficient to exclude an applicant from the bar: the Committee conceded, for instance, after I had persisted in refusals through several sessions and for several weeks, that I could without penalty refuse to answer the questions about religion that had been so strongly pressed upon me (page 292).

[fol. 481] It should be noted that the distinction drawn by the United States Supreme Court between constitutionally-based refusals to answer inquiries on the part of public employees and such refusals on the part of lawyers is a distinction reflected in the Illinois cases as well. (See *In re Holland*, 377 Ill. 346. Compare the cases, in recent years, of Chicago policemen.) A similar distinction seems to exist in New York as well. (This is pointed up by the difference between the *Lerner* case, 2 N.Y.2d 378, and *Matter of Grae*, 282 N.Y. 428, 26 N.E. 2d 963.)

Thus, attorneys are not to be penalized for a conscientious reliance upon the Constitution, however public employees are treated. As I have already shown, this distinction is emphasized by the Supreme Court cases directly on point for my matter, those dealing with applicants for admission to the bar, the *Schware* and *Konigsberg* cases, as well as by the famous *Garland* and *Cummings* cases. These cases provide the law for bar matters. In addition, the Illinois Court's 1957 Order lays down the law of this case, implicitly curtailing the power of the Committee even to

inquire during my rehearing into the matters about which I have on principle refused to testify.

I take it, furthermore, that the designation by the State of a refusal to answer inquiries as prejudicial to the cause of the citizen cannot be frivolous. In the *Lerner* and *Beilan* cases, there is not, so far as the Court's opinions indicate, anything comparable to the stipulation by the Committee in my matter, at page 265,

> . . . And in that connection, I will tell you this: that no one has stated [orally or in writing] to this Committee that you are or have ever been a Communist or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the organizations or any of the organizations listed as subversive by the Attorney General's list . . .

In the *Beilan* case, on the other hand, it seems to be suggested by the Court that the State must be able to "claim that the action [by the State] was part of a bona fide attempt to gain needed and relevant information." (2 L ed. 2d 1422) Earlier in that opinion, we are told, "The Superintendent said he had information which reflected adversely on petitioner's loyalty and he wanted to determine its truth or falsity." (2 L ed 2d 1417)

[fol. 482] Even from its own point of view, the Committee has in effect conceded it has no information reflecting adversely on my character and fitness. Of course, the Committee may pay special attention to my views on the right of revolution or to the fact of my refusals on principle to answer questions about possible membership in the Republican Party, the Ku Klux Klan, the Communist Party, the Silver Shirts of America, the Democratic Party and about religious beliefs and affiliations. But, I submit, such refusals in these circumstances, may even constitute evidence on my behalf. Certainly, my refusals and my views on the right of revolution do not constitute adverse evidence. *Slochower* v. *Board of Higher Education*, 350 U.S. 551. *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624.

Still another point should be noted. In the *Lerner* and *Beilan* cases, there is a more or less formal emphasis by the penalty-exacting State upon refusals to answer two questions; there seems to be little else in the way of inquiry in the records.

The Committee, on the other hand, has a four-hundred page transcript in which the justifications, purposes and relevance of the unanswered questions are, to say the least, shown to be questionable. It is a record with no adverse evidence and with more than enough positive evidence not only to sustain but even to require a finding favorable to my application.

In order to rely on the *Beilan* and *Lerner* cases to deny my application, the Committee would have to claim that the hearings should have been concluded after the first unanswered question (which happened to be about religious affiliations, at page 18), or soon thereafter when the first political questions were left unanswered (page 34).

But to make this claim would be to say that nothing I said in the twenty subsequent hours of hearings could have made any difference, except to make matters worse for me. It would also say, in effect, that all the evidence and arguments I had submitted and all the stipulations and admissions conceded by the Committee were inconsequential. Such a claim, I submit, would hardly conform to elementary notions of fair play and due process. Rather, it would make a mockery of bar admission proceedings.

You indicate in your letter that

> the Committee wishes to be advised whether, in the light of [the *Beilan* and *Lerner* decisions], [I] wish to change, modify or supplement any answers which [I] have given to the Committee's questions or alter [my] testimony in any other regard.

[fol. 483] I should like to advise the Committee that I must maintain my position as it is found in the Record. I am glad to be able to continue in this manner to be of service to the legal profession and to provide the Commit-

tee an opportunity to redeem the good name of the Illinois Bar.

Before I close, permit me to suggest that the overwhelming weight of both the Record and the relevant constitutional decisions support my application for admission. Still, I have never doubted that, the inexactness and flexibility of the law being what they must be, technicalities could be found whereby my continued exclusion from the bar could be justified in Chicago, in Springfield, or even in Washington.

Nevertheless, I cannot regret having chosen to conduct myself not in accordance with what I thought self-serving but rather in accordance with what I thought right. In the final analysis, our constitutional system and the rule of law can function properly only if there are enough men in responsible posts willing and able to act honorably, intelligently and with all deliberate speed.

I have the honor to reaffirm the position taken before the Committee. I trust that this letter will be seen as a solicited supplement to, not a substitute for, that position as it is set forth in the Record. Please let me know if there is anything else that might seem to the Committee to be even the slightest obstacle to a favorable decision on my application.

Respectfully yours,

George Anastaplo

[fol. 484]

COPY

6030 Ellis Avenue
Chicago 37, Illinois
February 26, 1959

Mr. D. Robert Thomas, Chairman
Committee on Character and Fitness
Room 1140, 29 South LaSalle Street
Chicago 3, Illinois

Dear Mr. Thomas:

I have, from time to time, made inquiries of the Secretary, both by letter and in person, about the status of my matter before the Committee on Character and Fitness. I understand that similar inquiries have been made by interested members of the bar, one of whom at least has spoken to the Secretary about the unsettling effect of this pending action upon my academic plans. I am writing, on the anniversary of my first appearance before the Committee in the course of my current rehearing, to request an authoritative explanation of the causes of delay in the announcement of a decision in this matter.

In addition to the explanation I seek, I should like to receive official approval of the lists of suggested corrections of the transcripts that I have submitted (June 29 and December 5, 1958). These corrections have been prepared in accordance with the arrangement worked out with the Committee during my final appearance before it last May. I occasionally receive inquiries about my case and should like to be able to refer inquirers to a copy of the transcripts which I could deposit in an appropriate law library after marking in these suggested corrections.

Respectfully yours,

George Anastaplo

[fol. 485]

COPY

COMMITTEE ON CHARACTER AND FITNESS

[Letterhead]

March 6, 1959

Mr. George Anastaplo
6030 Ellis Avenue
Chicago 37, Illinois

Dear Mr. Anastaplo:

This will acknowledge receipt of your letter of February 26 concerning the rehearing on your application for a Certificate of Character and Fitness to Practice Law. The Committee on Character and Fitness has been and currently is engaged in deliberations with respect to the disposition of your application. It is expected that the Committee's conclusion will be reported to the Illinois Supreme Court very shortly and you will be informed of the conclusion at that time.

The lists of suggested corrections of the transcripts, to which you refer in your letter, have been approved by the Committee.

Very truly yours,

/s/ D. Robert Thomas
Chairman

DRT:G

[fol. 486]

N. R. 780

IN THE
SUPREME COURT OF ILLINOIS
ON REHEARING

IN RE GEORGE ANASTAPLO

Application for Admission to the Bar of Illinois.

REPORT OF THE COMMITTEE ON CHARACTER AND FITNESS FOR THE FIRST APPELLATE COURT DISTRICT OF ILLINOIS—
Filed April 9, 1959

[fol. 487] MAJORITY REPORT

On June 5, 1951, the applicant, GEORGE ANASTAPLO, was notified by this Committee that on the basis of hearings conducted prior to that date he had failed to prove such qualifications as to character and general fitness as in the opinion of the Committee would justify his admission to the bar of Illinois.

The applicant appealed from this ruling to the Supreme Court of Illinois, seeking a reversal of this Committee's action. In proceedings entitled *"In re Anastaplo,"* 3 Ill. 2d 471 (1954), the Supreme Court of this State denied applicant's petition. The applicant then appealed to the Supreme Court of the United States, which court, treating the appeal as a petition for writ of *certiorari,* denied *certiorari,* 348 U. S. 946.

In its opinion the Supreme Court of Illinois held, based upon *American Communications Association* v. *Douds,* 339 U. S. 382, 94 L. ed. 925, 70 S. Ct. 674, *Dennis* v. *U. S.,* 341 U. S. 494, 95 L. ed. 1137, 71 S. Ct. 857, and *Re Summers,* 325 U. S. 561, 89 L. ed. 1795, 65 S.Ct. 1307, that certain inquiries directed to applicant by this Committee concerning applicant's political affiliations and organizational memberships did not violate either the First or Fourteenth [fol. 488] Amendment to the Constitution of the United States. (3 Ill. 2d at pp. 480-481.) In reaching this conclusion, our Supreme Court set forth the "established conspiratorial nature" of the Communist Party on the one hand and

the position of great influence of attorneys in the community on the other, and its genuine doubt whether a Communist Party member could in good conscience take the oath required as a condition of admission to practice. (3 Ill. 2d at p. 480.) From these premises it concluded:

> "Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate." (3 Ill. 2d at p. 480.)

Finally, our Supreme Court held that an applicant—knowing that the right to practice law is conditioned upon proof of his good moral character, of his general fitness to practice law and of his good citizenship, and upon the taking of an oath to support the Illinois and Federal Constitutions—may not defeat "pertinent inquiry into his ability to fulfill such conditions by any claim of the right of free speech." (3 Ill. 2d at p. 482.) In this connection it analogized the principles applied in the field of public employment and held that the application for admission to the Bar constituted an agreement "to waive his constitutional right of free speech against relevant inquiry." (3 Ill. 2d at pp. 482-483.) The opinion concluded:

> "We conclude that the committee's inquiry into petitioner's membership in the Communist Party was relevant to a determination of his good citizenship and his ability to take the oath of lawyer in good conscience, [fol. 489] and that petitioner's constitutional rights were not infringed upon by such action. On the present record the petition must be denied." (3 Ill. 2d at 483.)

On June 25, 1957, following the decisions of the Supreme Court of the United States in *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 1 L. ed. 2d 810, 77 S. Ct. 722, *Schware* v. *Board of Bar Examiners of State of New Mexico*, 353 U. S. 232, 1 L. ed. 2d 796, 77 S. Ct. 752, and

Yates v. *United States*, 354 U. S. 298, 1 L. ed. 2d 1356, 77 S. Ct. 1064, Anastaplo applied to this Committee by supplementary petition for rehearing of his application for admission to the Bar. On July 2, 1957, the Committee denied the application.

On September 17, 1957, the Supreme Court of Illinois entered the following order:

> "In 1951 the Committee on Character and Fitness for the First Appellate Court District denied the application of George Anastaplo for admission to the bar of Illinois. This Court affirmed the action of the Committee, (*In re Anastaplo*, 3 Ill. 2d 471.) and the Supreme Court of the United States denied certiorari. (348 U. S. 946.)
>
> "Subsequently the applicant filed with the Committee a petition for rehearing on the basis of certain decisions of the Supreme Court of the United States. The Committee denied this petition.
>
> "The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California*, 353 U. S. 252 and *Yates* v. *U. S.*, 1 L. ed. 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.
>
> "We are of the opinion that the Committee should [fol. 490] have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions."

On October 17, 1957, at the request of the Committee, acting pursuant to the Court's direction that he be granted a rehearing, applicant filed his responses to the customary questionnaire which the Committee requires be answered by all candidates for the Bar. In responding to the questionnaire, applicant, for the most part, supplied information to the Committee which supplemented the answers which were given to a previous questionnaire filed with the Committee on October 26, 1950. The Committee has also

received the usual attorneys' affidavits and character affidavits from persons familiar with the applicant and has had communications from various individuals whose names were given as references by the applicant and who supplied information concerning Anastaplo's moral character and general fitness to practice as an attorney.

Thereafter, this Committee conducted hearings on February 28, 1958, March 21, 1958, April 7, 1958, April 23, 1958 and May 19, 1958. Applicant appeared personally and gave oral testimony which, including argument, aggregates 420 pages in the record. In addition, the applicant has submitted to the Committee various law review articles, newspaper reprints and other exhibits and has addressed several letter communications to the Committee which appear in the record. During the hearings the Committee repeatedly reminded applicant that he had the right to be represented by counsel and to call witnesses, but he has preferred to rest his case on his own testimony and advocacy. (R. 3, 55.)

Since applicant's original application was denied, he has [fol. 491] been engaged principally in the academic life as an instructor and research assistant at the University of Chicago. From the character affidavits and reference letters which have been submitted to us, it would appear that the applicant is well regarded by his academic associates, by professors who had taught him in school and by members of the Bar who know him personally. We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group.

We have interrogated applicant at considerable length concerning his belief in the right to overthrow the government by force and violence. The applicant's views are perhaps best summed up in his own words which appear at p. 391 of the Record:

> "Almost everyone would agree there are times when a government should be overthrown by force. Ultimately, a citizen has to decide for himself when such

a time comes—when the principles of the Declaration of Independence apply. The conscientious citizen reserves the right and duty to judge his government even as he takes the oath to support not that government but the Constitution. In fact, our Constitution can be said to have this right implicit in it, a right that protects the Constitution itself from subversion by a government that may be constitutional only in appearance. But, as I said when I first appeared before the full Committee on January 5, 1951, I do not think anyone would be justified at a time such as this, when the normal processes of government permit reasonable and peaceful change, to participate in action leading to the overthrow of government.

[fol. 492] "The right of revolution, as I understand it, is something that probably all the members of the Committee on Character and Fitness and of the Supreme Court of Illinois believe in. The Committee must realize that I would be no less reluctant than they to see this right of revolution exercised except in the most extreme circumstances. I trust that my position, and what I have contributed to its defence, indicate an abiding commitment to constitutional government."

In explaining his view the applicant relied on excerpts from the Declaration of Independence and Lincoln's inaugural address in 1861, and quotations from Thomas Aquinas and Daniel Webster. (R. 158-159, 160, 390.) The applicant in answer to specific questions stated that he believed that the decision as to violent overthrow is essentially an individual one, but that the person making the choice should take into account the gravity of the provocation, the chance of his efforts succeeding, the general harm that his action may produce in the community, and whether his view is shared by any appreciable number of people. (R. 161-162.) The following exchange at one of the hearings sheds further light on the applicant's views in this regard:

"Q. It seems to me, the subjective versus the objective standard is quite important in connection with the questions we have been putting to you. If a

group of Communists believe fervently, passionately, in the kind of system that is repugnant to us, if the standard is purely subjective, then they would have the right to overthrow the government as quickly as they could, would they not?

"A. No, that is not simply the question, I mean —I do not assume that any fool who decides the Government should be overthrown has the right to do so. I am not saying any group of men, fools or not [fol. 493] fools, simply because they decide to overthrow the Government, have a right to do so. I am saying only that under certain circumstances there is a right to overthrow governments.

"Let me give you an example, a couple of examples, of recent date, of two unsuccessful revolutions which I think reflect the general American opinion, I won't say necessarily reflect mine, but the general American opinion. At the end of the war, toward the end of World War II, Hitler's generals made an attempt to overthrow him. You have all heard that. They were unsuccessful. Two years ago the Hungarians made an attempt to overthrow the government. They were unsuccessful. There is no doubt, I think, on the part of the general American population, that both of these attempts at revolution were legitimate in the sense that there was no principle about the right of revolution being violated here. The only problem that one would have, I suppose, in the general opinion would be in terms of the prudence, circumstances and consequences of the particular situations." (R. 166-167.)

The applicant has further stated to the Committee that he does not believe in the right to use force until peaceful means to redress an evil have been exhausted or appear futile. In relating his views with respect to overthrow to the political situation at the present time, applicant stated that he did not foresee any condition developing where revolution would be either desirable or valuable. (R. 170.)

A majority of the Committee has arrived at the conclusion that the views expressed by the applicant with respect to the right to overthrow the government by force or vio-

lence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and through- [fol. 494] out the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines. In view of this conclusion there is no need to consider in this connection either *Yates* v. *U. S.*, 354 U. S. 298, or *Konigsberg* v. *State Bar of California*, 353 U. S. 252. However, the *Konigsberg* case is necessarily considered in respect to the Committee's authority to ask certain questions of applicant, *infra*, pp. 12-13.

Apart from applicant's views as to the overthrow of the Government by force, certain other views expressed by him in these proceedings bear upon his attitude toward established authority and orderly governmental procedures. The Committee regards these views as relevant to an inquiry into the character and fitness of an applicant for admission to the bar.

One such other matter was the applicant's refusal to deny that circumstances might exist under which he would resist by force Federal or State officials seeking to enforce judgments or decrees in proceedings against him personally which had become final after full review by the highest court having jurisdiction. (R. 174-178, 237-240.) In his language, "I would not care to say there might not be instances where resistance to an officer of the law executing such a mandate might not be improper." (R. 176.) If admitted to the Bar and advising a client, he testified that he would not advise the client to resist by force or other similar means a final judgment or decree against the client, because in his opinion it was his duty to advise the client only "with respect to the legal system as it exists." (R. 177.) "In so far as I am a lawyer, I can tell him what his rights are under the accepted law * * * under the Canons of Ethics I would be derelict in my duty if I presume to do much more than that." (R. 239.) He denied that [fol. 495] he was arrogating to himself rights or privileges which he would deny to others as "citizens." (R. 239-240.) He testified that "If, however, he (the client) were thereupon to approach me on some other basis, not as an attor-

ney, there may be other advice I would be willing to give him." (R. 240.) He saw no inconsistency between such an opinion and the taking of an oath loyally to support the Constitution of the State of Illinois and the Constitution of the United States "without any reservation whatsoever." (R. 238.)

These views raise a serious question whether the attitude expressed by applicant toward final court determinations binding upon him and toward attempts to enforce them in accordance with the law is consistent with the oath required of attorneys in Illinois. Upon admission, an attorney is an officer of the courts, and one who holds such views as the applicant's would fall within the condemnation expressed by the United States Supreme Court in the opinion signed by all the Justices in *Cooper* v. *Aaron*, 358 U. S. 1, 3 L. ed. 2d 5, and rendered on September 29, 1958:

> "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." (358 U. S. at p. 8.)

The further attitude expressed by applicant about advising others along the same subversive lines in his capacity as "citizen" as distinguished from his capacity as "attorney," also raises serious questions concerning his capacity to take the oath required of Illinois attorneys. Our Supreme Court in *In re Anastaplo*, 3 Ill. 2d 471, at p. 479, pointed out the importance of the fact in Bar application cases that attorneys hold positions of public trust which [fol. 496] give them unique opportunities to impress their views and attitudes upon the public.

Perhaps the major issue presented to the Committee arose from the applicant's continued refusal to answer questions regarding possible Communist or other subversive affiliations. (R. 34, 35-37, 42-43, 46-47, 64, 65, 66, 94-97, 98-99, 105, 172-173, 336.) We felt justified in questioning applicant on such matters for the following reasons:

1. His refusal to respond to such questions in connection with his previous candidacy was undoubtedly the controlling reason why his application was denied by the Com-

mittee and was the pivotal point in the decision of the Supreme Court of Illinois affirming the Committee's action.

2. The Committee believes that its right to question the applicant on possible subversive affiliations has not been foreclosed by the *Konigsberg* decision. (*Konigsberg* v. *State Bar of California*, 353 U. S. 252.) This view is clearly confirmed by the later decisions of the Supreme Court of the United States in *Lerner* v. *Casey*, 357 U. S. 468, 2 L. ed. 2d 1423, 78 S. Ct. 1311, and *Beilan* v. *Board of Education*, 357 U. S. 399, 2 L. ed. 2d 1414, 78 S. Ct. 1317, both of which expressly distinguished the *Konigsberg* case.

3. The Committee was convinced that the applicant's credibility in connection with his answers to questions pertaining to the right of overthrow and the enforceability of judicial decrees should be tested by questioning him about possible subversive beliefs and activities.

4. The Committee believed that the applicant's ability to take the oath in good faith as an attorney of this State could be seriously questioned if he were an active and disciplined member of the Communist Party, especially at this juncture of history. (R. 115-116.) The Committee re-[fol. 497] peatedly warned the applicant that questions regarding Communist affiliation were viewed as important by the Committee members and that his failure to respond to them could adversely affect his application for admission to the bar. (R. 37, 116-117.) The Committee further reminded applicant that Congress, the Supreme Court of the United States and various legislatures and courts had classified the Communist Party as something separate and distinct from other political parties, and that in several jurisdictions the Party had been branded as a criminal conspiracy. (R. 115-117.) The Committee further stated that it might view a doctrinaire adherence to Communist goals as one thing, but active membership in the Party as quite another, and pointed out that until the applicant gave a candid response to the Committee's questions it could not formulate any judgment on applicant's basic loyalty. (R. 132.)

5. The Committee was directed to report to the Court on the applicant's activities since his original application

was denied. The principal way in which the Committee ascertains the activities in which a candidate has been engaged is by asking him questions.

Notwithstanding the foregoing, the applicant persistently refused to answer questions concerning Communist or other subversive affiliations. To explain his refusal he stated that such inquiries violated fundamental civil rights guaranteed to him by the First and Fourteenth Amendments to the Federal Constitution and by the Constitution of the State of Illinois. He did not rely upon any privilege against self-incrimination. He stated that his political beliefs were not a proper subject of inquiry by the Committee and bore no relevance to the question of his character [fol. 498] and fitness.* He objected to any inquiry into such matters since the Committee, in his view, had laid no foundation for such an inquiry and had no evidence before it which would justify what he considered an intrusion into his private beliefs; he did not consider that his views with respect to overthrow of the government or disobedience of judicial decrees furnished any basis for any such questions. (R. 139, 155-157, 173.)

The applicant relies heavily on the *Konigsberg* case to support his refusal to answer questions concerning possible subversive affiliations and activities. We read the *Konigsberg* case to hold that a committee performing functions similar to our own is not entitled to draw an inference of bad moral character merely from the applicant's refusal to answer questions concerning membership in the Communist Party if such refusal is based on a good-faith belief that the United States Constitution prohibited the type of inquiry which the Committee was making and if the reviewing court can "find nothing in the record which indicates that his position was not taken in good faith." (353 U. S. at p. 270.) The Court pointed out that the State Committee of Bar Examiners in California had at no point intimated to Konigsberg that he would be barred from the profession just because he refused to answer relevant inquiries or

* The applicant did not adopt this position at all stages of the hearing. He freely answered portions of the questionnaire dealing with constitutional doctrine and expatiated at length on his belief in violent overthrow.

because he was obstructing the Committee. In the view of the Court the Committee's action was based principally upon inference which it drew from certain of applicant's past utterances, prior membership in the Communist Party and refusal to answer questions bearing upon present mem- [fol. 499] bership in the Party. (353 U. S. at p. 266.) The court held that considering the record as a whole such inferences were not permissible. The court expressly left open the question whether Konigsberg's constitutional objections to the Committee's questions were well founded and whether the Committee would be justified in insisting that its questions be answered. (353 U. S. at p. 270.)

The *Konigsberg* case is therefore not determinative in this proceeding. The United States Supreme Court in holding in that case that a committee like ours is not entitled to draw an inference of bad moral character merely from an applicant's refusal to answer questions concerning membership in the Communist Party, if such refusal is based upon a good faith belief that the United States Constitution prohibits the type of inquiry which the committee was making and if the Court could find nothing in the record to indicate bad faith on his part (353 U. S. 252, 270), did not hold that such a condition of a record affirmatively entitled an applicant to certification. Upon determination of the propriety of the questions and the lack of substance in the objections thereto the applicant would be entitled to another opportunity to answer, and if he persisted in his refusal to do so, the committee would not be acting inconsistently with *Konigsberg* in denying a certification.

Since the rehearing was granted herein, the United States Supreme Court decided on June 21, 1958, the cases of *Lerner* v. *Casey*, 357 U. S. 468, 2 L. ed. 2d 1423, 78 S. Ct. 1311; and *Beilan* v. *Board of Education of Philadelphia*, 357 U. S. 399, 2 L. ed. 2d 1414, 78 S. Ct. 1317, in which the Court clearly determined the propriety of questions of the kind asked the applicant in these proceedings. We called applicant's attention to these two most recent decisions and offered to him the opportunity to change his testimony [fol. 500] in any manner he saw fit in the light of them. (Committee letter to applicant dated September 16, 1958.) He declined. (Applicant's letter to the Committee dated

September 23, 1958.) His continued refusal to answer, evidenced by his reply of September 23, 1958, deprives him on this record of any argument of similarity between his status and that of Konigsberg and of any benefit from the decision in the *Konigsberg* case.

In *Lerner* v. *Casey, supra,* petitioner, a subway conductor in the New York City Transit System, was discharged by his employer under the New York Security Risk Law on the ground that his refusal, based upon the privilege against self incrimination guaranteed by the Fifth Amendment, to answer a question of his employer as to his membership in the Communist Party, showed that he was of doubtful trust and reliability. Petitioner sued in the New York State Court for reinstatement, attacking his discharge on various grounds, including lack of due process. The New York Supreme Court dismissed the suit and the Appellate Division and Court of Appeals both affirmed. On certiorari the United States Supreme Court also affirmed. Justice Harlan for the majority said:

> "In other words, we read the court's opinion as meaning that a finding of doubtful trust and reliability could justifiably be based on appellant's lack of frankness, *cf. Garner* v. *Board of Public Works,* 341 U. S. 716; *Beilan* v. *Board of Public Education, ante,* p. 399, decided today, just as if he had refused to give any other information about himself which might be relevant to his employment. It was this lack of candor which provided the evidence of appellant's doubtful trust and reliability which under the New York statutory scheme constituted him a security risk. The Court of Appeals went on to reason that had appellant refused, without [fol. 501] more, to answer the question, the finding of 'doubtful trust and reliability' would have undoubtedly been permissible, and that the basis for such a finding, in appellant's refusal to answer, was not destroyed by the claim of the Fifth Amendment privilege because the Commissioner was not required to accept that claim as an adequate explanation of the refusal.
>
> "Accepting as we do, these premises of the state court's opinion, we find no constitutional block to its

decision sustaining appellant's dismissal from employment • • •

"Nor, as the Court of Appeals stressed, was the claim of possible self-incrimination made the basis for an inference that appellant was a Communist and therefore unreliable. Hence we are not faced here with the question whether party membership may rationally be inferred from a refusal to answer a question directed to present membership where the refusal rests on the belief that an answer might incriminate, *cf. Adamson* v. *California*, 332 U. S. 46, or with the question whether membership in the Communist Party which might be 'innocent' can be relied upon as a ground for denial of state employment. *Cf. Wieman* v. *Updegraff, supra; Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.

"We think it scarcely debatable that had there been no claim of Fifth Amendment privilege, New York would have been constitutionally entitled to conclude from appellant's refusal to answer what must be conceded to have been a question relevant to the purposes of the statute and his employment, *cf. Garner* v. *Board of Public Works, supra,* that he was of doubtful trust and reliability. Such a conclusion is not 'so strained as not to have a reasonable relation to the circumstances of life as we know them.' *Tot* v. *United States*, 319 U. S. 463, 468. This Court pointed out in *Garner* that a government employee can be required upon pain [fol. 502] of dismissal to respond to inquiry probing into matters relevant to his employment, and that present membership in the Communist Party is such a matter. See also *Beilan* v. *Board of Public Education, supra.* Certainly it is not a controlling constitutional distinction that New York, rather than impose on employees, as in *Garner* and *Beilan*, an absolute duty to respond to permissible inquiry upon threat of dismissal for refusal, has in these proceedings held that an employee lacking in candor to his governmental employer evidences doubt as to his trust and reliability. Finally, unlike the situation involved in *Konigsberg* v. *State*

Bar of California, supra, there is here no problem of inadequate notice as to the consequences of refusal to answer, for appellant was specifically notified that continued refusal might lead to his dismissal." (See 357 U. S. at pp. 476, 477-8.)

In *Beilan v. Board of Education of Philadelphia, supra,* petitioner, a public school teacher, was discharged by the local school board for "incompetency" under the Pennsylvania School Code, because of his refusal, continued after warning that failure to answer might lead to dismissal, to answer a question of his superintendent as to his membership in a Communist political association. On an administrative appeal, the superintendent sustained the local Board, but the County Court set aside the discharge. On appeal by the Board the Pennsylvania Supreme Court reversed and reinstated the discharge. On certiorari the United States Supreme Court affirmed. It held that due process was not violated by petitioner's discharge on the ground of "incompetency" evidenced by petitioner's refusal to answer the request of the superintendent for information as to the teacher's loyalty and as to his activities in certain subversive organizations, such refusal being based upon the Fifth Amendment and other constitutional objections. [fol. 503] Justice Burton said:

"The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory 'incompetency' based on his refusal to answer the Superintendent's questions.

"By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher. * * *

"The question asked of petitioner by his Superintendent was relevant to the issue of petitioner's fitness and suitability to serve as a teacher * * * He made it clear that he would not answer any question of the

same type as the one asked. Petitioner blocked from the beginning any inquiry into his Communist activities, however relevant to his present loyalty. The Board based its dismissal upon petitioner's refusal to answer any inquiry about his relevant activities—not upon those activities themselves. It took care to charge petitioner with incompetency, and not with disloyalty. It found him insubordinate and lacking in frankness and candor—it made no finding as to his loyalty. * * *

"In the instant case, the Pennsylvania Supreme Court has held that 'incompetency' includes petitioner's 'deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness.' 386 Pa., at 91, 125 A. 2d, at 331. This interpretation is not inconsistent with the Federal Constitution. * * *

"Our recent decisions in *Slochower* v. *Board of Education*, 350 U. S. 551, and *Konigsberg* v. *State Bar of California*, 353 U. S. 252, are distinguishable. * * *

"In the *Konigsberg* case, *supra*, at 259-261, this Court stressed the fact that the action of the State [fol. 504] was not based on the mere refusal to answer relevant questions—rather, it was based on inferences impermissibly drawn from the refusal. In the instant case, no inferences at all were drawn from petitioner's refusal to answer. The Pennsylvania Supreme Court merely equated refusal to answer the employing Board's relevant questions with statutory 'incompetency'.". (357 U. S. at pp. 404-406, 408-409.)

In the instant case, as in *Lerner* and *Beilan*, and unlike the situation in *Konigsberg*, no problem exists as to inadequate notice of the consequences of a refusal to answer; the applicant was specifically notified both by the Illinois Supreme Court in its opinion in 3 Ill. 2d 471, and by this Committee on rehearing that his continued refusal to answer might lead to the denial of his application. (R. 37, 116-117.)

In the course of the rehearing proceedings, the Committee conducted no independent investigation into appli-

cant's character, reputation or activities. The Committee has no personnel nor other resources for any such investigation. For this very practical reason, the Committee has traditionally asserted the view that it cannot be expected to carry the burden of establishing, by independent investigation, whether or not an applicant possesses the requisite character and fitness for admission to the bar. It is rather for the applicant to establish, on his own behalf, that he possesses the necessary qualifications and it is for the Committee to test, by hearings and inquiry of the applicant, the worth of the evidence which the applicant proffers.

Because the applicant has refused to answer questions, we are unable to report whether his activities since the denial of his original application have included member-[fol. 505] ship, office holding or other activities in the various organizations listed on the Attorney General list of subversive organizations. We are also unable to report what his reputation is among the members of any organization with which he may be affiliated, since he has declined to inform us of his affiliations.

In the instant proceeding a majority of the Committee is of the opinion that applicant's petition for a license should be denied because he has failed to meet the burden which is on him of establishing his proper character and fitness. By refusing to answer questions deemed by the Committee to be relevant, he has thereby failed to establish that he has the necessary character and fitness and the Committee is therefore unable to certify him.

In this connection the Supreme Court in *In re Anastaplo*, 3 Ill. 2d 471, said (pp. 480, 483):

> "It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, fur-

ther inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the com- [fol. 506] mittee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate.

* * * * *

"We conclude that the committee's inquiry into petitioner's membership in the Communist Party was relevant to a determination of his good citizenship and his ability to take the oath of lawyer in good conscience, and that petitioner's constitutional rights were not infringed upon by such action. On the present record the petition must be denied."

A majority of the Committee continues to adhere to the views which were the basis of its decision on Anastaplo's prior application and which were expressed by the Supreme Court of Illinois in *In re Anastaplo,* 3 Ill. 2d 471 at 480-483, to the effect that it may properly interrogate an applicant as to membership in the Communist Party or in any other subversive group and that such inquiries are revelant to character and fitness. It believes that an applicant is not protected from such questions by any provisions of the State or Federal Constitutions. An applicant, of course, need not answer the question and cannot be punished for his refusal to respond. But his failure to reply, in our view, (i) obstructs the lawful processes of the Committee, (ii) prevents inquiry into subjects which bear intimately upon the issue of character and fitness, such as loyalty to our basic institutions, belief in representative government and *bona fides* of the attorney's oath and (iii) results in his failure to meet the burden of establishing that he possesses the good moral character and fitness to practice law, which are conditions to the granting of a license to practice law.

[fol. 507] We draw no inference of disloyalty or subversion from applicant's continued refusal to answer questions

concerning Communist or other subversive affiliations. We do, however, hold that there is a strong public interest in our being free to question applicants for admission to the bar on their adherence to our basic institutions and form of government and that such public interest in the character of its attorneys overrides an applicant's private interest in keeping such views to himself. By failing to respond to this higher public interest we hold that the applicant has obstructed the proper functions of the Committee. By reason of applicant's own recalcitrance he has failed to demonstrate the good moral character and general fitness to practice law necessary for admission to the Bar. We cannot certify the applicant as worthy of the trust and confidence of the public when we do not know that he is so worthy and when he has prevented us from finding out.

Certain members of the Committee (who are included within the majority who believe that applicant's petition for a license should be denied because he has failed to meet the burden which is on him of establishing his proper character and fitness) are of the further opinion that the record demonstrates affirmatively applicant's lack of the character and fitness necessary for admission to the Bar. They base their views upon (i) applicant's refusal, after the *Lerner* and *Beilan* decisions were called to his attention, to modify his refusal to answer the Committee's questions concerning Communist Party and other possible subversive affiliations and (ii) applicant's view that circumstances might exist under which he would not abide by, and [fol. 508] might advise other citizens not to abide by, final decrees of a court of law and to resist by force their enforcement by appropriate legal process, when considered in connection with his views as to the overthrow of the government by force and violence.

It is the conclusion of the Committee that the application should be denied.

Respectfully submitted,

COMMITTEE ON CHARACTER AND FITNESS FOR THE FIRST APPELLATE COURT DISTRICT OF ILLINOIS.

The following members of the Committee join in the foregoing report:

D. Robert Thomas, *Chairman*,
Charles A. Bane,
Richmond M. Corbett,
Walter H. Moses,
John M. O'Connor, Jr.,
Francis J. Seiter,
Len Young Smith,
Robert A. Sprecher,
Edmund A. Stephan,
Jerome S. Weiss,
Horace A. Young.

[fol. 509] Minority Report

We cannot join in the majority report.

The Supreme Court has asked us to hear evidence on three questions. The Committee is apparently unanimous in the conclusion that nothing in the answers to those three questions reflects adversely upon the applicant. The answers, as stated by the majority, are:

(1) "The views expressed by the applicant with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines."

(2) Since his original application was denied, he has been engaged primarily in academic life at the University of Chicago.

(3) He is "well regarded by academic associates, by professors who * * * taught him in school and by members of the Bar who know him personally."

The majority nevertheless find reasons to deny admission. This is not because of any evidence derogatory to the

applicant, for there is none. As the majority states and we agree:

> "We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group."

In the face of all of this, how does the majority reach its result? It does so solely because of applicant's refusal [fol. 510] to answer certain questions which are considered relevant, and because the burden of proof is on the applicant. The fact that the questions are relevant and the burden of proof on the applicant, does not relieve us of the obligation of considering the entire record and weighing all of the evidence. It does not give us the right to seek reasons to deny admission or to find those reasons in a refusal to answer under the circumstances of this case. In considering the entire record, applicant's refusal to answer is only one factor. It must be analyzed against the entire record and applicant's reasons for his refusal, and not used as an excuse, without more, for denying admission.

The record in this case, fairly read, reveals nothing reflecting adversely on applicant's moral character or reputation, or containing the slightest suggestion of disloyalty. This despite the fact that applicant has been before us at various times for seven and one-half years and has received considerable public attention.

The actual, limited extent of applicant's refusal to answer should be made clear. Applicant has answered fully all questions, including those concerning his political beliefs, except only such questions as were of such a specific nature and intent as—in the very answering—necessarily to reveal adherence or non-adherence to or membership or non-membership in a particular, identifiable organized political or religious group.

On this record, applicant's refusals can have significance only if they have made it impossible for us to determine the questions before us or have evidenced such a disrespect

for this Committee, the Court and the community as to reflect on his character. Neither is the case here. His refusals have made it more difficult for us to discharge our [fol. 511] duty, but they have not prevented us from doing so or relieved us of that duty.

The applicant did not set out to frustrate the work of the Committee by refusing both to answer and to explain the reasons for his refusal. Instead, he willingly gave us his views and was subjected to a most searching inquiry into his reasons which he explained repeatedly and in detail. His offense, as the majority sees it, is that he believes as a matter of principle, that we cannot constitutionally ask the questions he has refused to answer. He believes further that it is important that he refuse to answer. And he has adhered to these beliefs at a cost to date of seven and one-half years of his professional life.

The worst that can be said about applicant in this regard is that he may be wrong in his beliefs or in carrying them as far as he does. That some of us do not agree with the applicant and others would not be as persistent in our devotion to principle is of no relevance or significance. Nonconformity, if any there be, and devotion to principle do not reflect adversely on character and are strange grounds for denying admission.

We believe that the applicant is sincere and conscientious in his beliefs, and that his refusal to compromise these beliefs in no way makes him unfit, immoral or of bad character. Honest error or unorthodoxy in political philosophy is not a ground for denial of a license to practice law.

When all is said and done, the majority denies admission because the applicant disagreed with the Committee by [fol. 511a] refusing to answer and in so doing, made the Committee's work more difficult. This is not a valid ground. We are not infallible and agreement with us is not and should not be a *sine qua non* to admission. And although the applicant's position made our task more difficult and time consuming, it did not prevent us from accomplishing it. We are here for the hard cases and an applicant who presents a hard case should not be punished for doing so, particularly where the difficulty arises from the applicant's

adherence to conscientious scruples as to the meaning of the Constitution.

The majority finds support for its decision in an excursion into applicant's attitude toward possible future court orders affecting him, his clients or his friends. Apart from the fact that this goes beyond matters we were directed to examine, we find nothing in these philosophic observations which reflects adversely upon applicant's character or fitness, as we understand those terms.

We do not agree that because the applicant did not enlarge on his views as to the effect of later cases on the *Konigsberg* decision of the Supreme Court of the United States, this in any way detracts from the controlling importance of that case on this one, or, as is suggested, deprives the applicant of the right to rely on that decision. It is still the law of the land, and despite all distinctions that may be made, the fact is that there was far more basis for the questions put to Konigsberg than those put to the applicant here. In *Konigsberg,* there was independent evidence of prior Communist membership and involvement. [fol. 511b] Here there is absolutely nothing. Yet in *Konigsberg* the applicant was upheld in his refusal to answer questions of the kind involved here.

In any event, assuming we have a right to ask such questions as applicant has refused to answer, we need not insist upon obtaining an answer in response to our exercise of that right in a case where we have no foundation whatsoever for asking such questions except a desire to vindicate the status of the Committee. This is not an adversary proceeding where we sit to see, above all else, to the strict enforcement of our "rights" as against the applicants required to come before us.

It seems contrary to the proper purpose and spirit of this Committee to insist upon an inflexible rule that a refusal of an applicant to answer any question deemed lawful and relevant by the Committee automatically, and without more, forecloses the applicant from the favorable disposition of the Committee. It is, rather, our function, when faced with an applicant who shows some independence of spirit and thought, to display the same humanity, tolerance and common sense with which we pass upon the

applications of all the hundreds of other more tractable applicants whom we continue to certify through the years. Accordingly, our function is fulfilled in such cases when we see to it that an applicant who refuses to answer any relevant question has produced the same strong evidence as has this applicant of his good reputation and activities and has convinced the Committee, after hearings, that his refusal to answer is equally made with complete candor and in good faith and is not arbitrary, devious, or made for ulterior or irrational reasons.

[fol. 511c] In our view, the applicant has discharged the burden of proof that he has the requisite character and fitness. We know him well from protracted hearings and over-exposure to his views. He has demonstrated that he is a moral and patriotic American and that his views on the right of revolution are without significance. He is well thought of in the community and discharges important responsibilities. Despite the physical burdens of long hearings, applicant conducted himself in a gentlemanly manner and was temperate even in his criticism, particularly if, as he feels, he has been wronged by the Committee.

We now know the applicant is fit and of good character. On this record, it is pure sophistry to hold that his refusals to answer have prevented our determining his character and fitness. To deny admission under these circumstances would be a disservice to the Bar and a violation of the traditional concepts of fairness and due process. To do so under the shelter of burden of proof is a retreat to formalism we are unable to join.

Our conclusion is that the applicant should be granted a certificate of satisfactory character and fitness.

The following members of the Committee join in the foregoing report:

James P. Carey, Jr.,
J. R. Christianson,
James E. Hastings,
George N. Leighton,
Edward I. Rothschild,
Calvin P. Sawyier.

[fol. 512]

IN THE SUPREME COURT OF ILLINOIS

Informal Action, A.D. 1959

No. 780

IN RE GEORGE ANASTAPLO, Applicant.

Appendix to the 1959 Brief for the Applicant—Filed April 30, 1959

APPLICATION FOR ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF ILLINOIS

George Anastaplo,
Counsel *pro se*

George Anastaplo, Counsel *pro se*
6030 Ellis Avenue
Chicago 37, Illinois
Dorchester 3-4825

April 29, 1959

[fol. 513]

6030 Ellis Avenue
Chicago 37, Illinois

April 16, 1959

Mr. D. Robert Thomas, Chairman
Committee on Character and Fitness
29 South LaSalle Street
Chicago, Illinois

Dear Mr. Thomas:

I write to secure your cooperation in clearing up an important point of fact about which the Supreme Court might otherwise and through inadvertence be misled in considering next month your Committee's Report.

You might recall my observation, at page 363 of the Transcript of Record during my Rehearing, that many members of the Committee, and perhaps all of them, "know people who know me well, both down here on LaSalle Street and out on the Midway." This was said in the context of my evaluation of the evidence favorable to my application.

I was reminded of this observation when I read, at page 18 of the Committee's Report of last week, "In the course of the rehearing proceedings, the Committee conducted no independent investigation into applicant's character, reputation or activities. The Committee has no personnel nor other resources for any such investigation."

Since receiving this Report, I have been informed that at least three members of the Committee majority have made inquiries of or discussed my matter with members of the Chicago bar who have known me for some time. These inquiries related to my background, character and activities, as well as to other topics. I have reason to believe that Committee members were given nothing but favorable information about me on these and other occasions.

I should like to have the fact that this kind of information was received officially acknowledged. Consequently, I would be obliged if you could inquire of the members of the Committee, who I understand are to meet April 24, how many of them did in fact make inquiries of or discuss my matter with friends or acquaintances of mine before the Committee Report was issued. I should like as soon as possible to add this information, as well as any comment you might want to make on this point, to the Record that has been submitted to the Supreme Court.

Respectfully yours,

George Anastaplo

[fol. 514]

COMMITTEE ON CHARACTER AND FITNESS

[Letterhead]

April 24, 1959

Mr. George Anastaplo
6030 Ellis Avenue
Chicago 37, Illinois

Dear Mr. Anastaplo:

In your letter of April 16, 1959, you request that the members of the Committee be asked whether they had made inquiries of or discussed your application with friends or acquaintances of yours before the Committee Report was issued.

The Committee has considered your request and deems it inappropriate that such inquiries be made of the individual members. The decision of the Committee was made solely on the record before it, which has been closed and sent to the Supreme Court.

Sincerely yours,

/s/ D. Robert Thomas
Chairman,
Committee on Character
and Fitness.

DRT:mal

[fol. 515]

A COMMENT, by Professor Malcolm Sharp, The Law School, The University of Chicago (1951).

[Letter to George Anastaplo at Dallas, November 23, 1951]

In response to your question about a comment on the general problem raised by your case, I should like to make such a comment. I wonder however whether the letters which I

have hitherto used as statements of my views would not do better. They are meant to indicate not only an opinion about your case, but a judgment about other problems of the sort. I am sending you copies of the three letters which we have discussed, with what I take to be suitable omissions of rather personal remarks. I am having extra copies made, because I want some for my files anyway, so I may as well send you fresh ones. You are perfectly free to use them together with this note in the mimeographed publication which you are planning. My only request is that if there are other omissions or any editing, you let me first approve the changes made. I should in fact be pleased to be associated with you in this way in your publication [*Some Rash Innovations and Speculations*], and I appreciate your suggestion.

It should perhaps be made perfectly clear that it is an essential feature of the case that you have not argued that you are not a Communist. The argument appearing in my correspondence is different; that there is in the record as a whole no evidence that you are one; no evidence whatever unfavorable to your character or citizenship; and that there is, on the contrary, from what we may judge about the affidavits submitted on your behalf, plenty of evidence of your good character and good citizenship. The effect of the affidavits has apparently been strengthened, as I have learned since August, by the answers to the inquiries of the Committee's investigator in your home town.

There are two other observations which ought perhaps to be added for the benefit of any readers of our correspondence.

One thing has occurred to me with increasing force as I have reflected on the matter. It is to say the least curious for members of a profession which has insisted so strongly that its members are not government servants, to rely on the analogy or authority of cases dealing with loyalty proceedings for government officers or employees. The profession complains about anything that looks remotely like "socialization", but insists on oaths and loyalty proceedings for its members. It cannot be said that this position is justified by the "sensitive" character of its professional activity.

Legal work is in this respect less like that of atomic scientists, diplomats and military men, and more like that of the Post Office Department.

In the second place, I have had some information recently which seems reliable about what is being done in New York City and in Connecticut. The Committee in New York City is apparently following the practice of legislative and congressional investigating committees and loyalty boards in asking applicants about membership in organizations, in the case about which I am told, an organization not even [fol. 516] on the ill-fated Attorney General's list. In Connecticut, according to reliable information, the Committees are asking about the applicants' views about the Marshall Plan and foreign policy generally. A person of my general political views, if he should find himself on such a committee, might so far forget himself as to inquire whether an applicant is among the Friends of Franco. I hope he would be able to restrain himself, but with all this talk going on, that might be difficult.

[Letter to George Anastaplo at Paris, March 26, 1951]

It was good to get your note of March 5th, and to gather that you are enjoying yourself thoroughly. . . .

As we have observed . . . there is something besides a constitutional issue involved in your case. There are questions of proof and of the scope of the Committee's authority as well. In addition to your academic record, your files doubtless contain at least a good prima facie case with respect to your character and good citizenship. I find, however, that this argument does not make quite the impression which one might expect as everyone knows about people with good military records about whose loyalty now doubts could be raised. Quite apart from this factor, however, the affidavits which have been made in your favor, and perhaps other items as well, must make a strong case with respect to your character and citizenship.

The only questions are those raised by three or four of your statements. There is a statement that you think Commu-

nists are not on account of their Communism alone disqualified to practice law. There is your defense of the philosophical right of revolution, and your statement that this right, insisted on by the Catholic Church as well as the Communist Party, is in a way part of our constitutional law, particularly if the Declaration of Independence is treated as a constitutional document. Your statement on these matters is carefully qualified by your testimony that you would not favor or indeed tolerate revolution in the United States while present democratic processes are working as well as they now are. Finally, there is your refusal to answer the questions whether you were once a subscriber to the Daily Worker and whether you are now a Communist.

I do not see how anyone can think that your statements, including your refusals to make statements, on these points, could be treated in the present state of the record as any evidence whatever that you are a Communist or what is loosely known as a Communist sympathizer. I judge that some members of the Committee at least agree with me on that point. In relation to the record of the rest of your career, these open statements create no inference whatever, nothing approaching probability, that you are a Communist or a Communist sympathizer. They are quite as consistent, indeed I should say in the state of the record more consistent with, a concern for traditional civil liberties which is among the best features of American life.

[fol. 517] As I understand it, the only objection to your record which the Committee can seriously make is based on what some of the Committee consider your uncooperative attitude in dealing with them. Again, as some of the Committee recognize, your attitude is not non-cooperative in any sense which would raise legitimate questions about your good citizenship. You are simply very serious, perhaps as some members of our own faculty think, too serious, in insisting on your own views about intellectual and political freedom. While members of the Committee may differ in their opinion of the position you have taken, it is hard to see how any of them, once they stand off and look at the matter, can suppose that your refusal to agree with their view is simply non-cooperation. Your position is from anyone's point of view an expression of serious and courageous

citizenship, and that I take it means good citizenship. If one is serious and courageous in developing and expressing his position on public issues, that is strong evidence of good citizenship, however much others may differ with the views expressed.

If the record indicated in any way that you were a Communist or a Communist sympathizer, the seriousness of your purposes might not be an answer to the position of some members of the Committee. But in the absence of evidence to that effect, your conduct seems, on careful consideration, to indicate rather good citizenship than the reverse. . . .

Though I began, as you will remember, by disagreeing with the position which you were taking before the Committee, and urging you to abandon it, I have respected it from the outset. Indeed, as I said to you before you went abroad, I am almost convinced that it is a position which people ought to take in similar cases. I think I am the only member of the faculty who feels that way, but one of my colleagues said lately that he understood now better than formerly what you were driving at. Your problem is closely related to the problem of the oath, and eminent and conservative lawyers are among the minority in the American Bar Association who have emphatically opposed the Association's position in advocating a loyalty oath for lawyers. There may be cases where affiliation or sympathy with the Communist Party will be one factor contributing to disqualification for practice. But the development of oaths for every candidate, or the similar insistence on putting questions about Communist affiliations to every candidate, contributes to the hysteria of the times and can do little or no good. Saboteurs and spies are caught by other methods. The attitude of the Bar on the present situation recalls ominously the attitudes toward Germans and radicals which developed during the First World War, which we were spared by a happy combination of circumstances during the Second World War. These attitudes are a sign of individual instability and anxiety on the part of those who express them, and contribute to the weakness and excitability of the community rather than to its strength.

I have tried to put down my present reflections on your case in a somewhat orderly way, and you are of course free to use this letter in any way you wish.

I hope you are all still having a fine time.

[fol. 518] [Letter to an interested Chicago attorney, September 18, 1951]

. . . There are two main points to the case as I see it. First is the state of the record in relation to George. Second is the general objection to the Committee's decision on its own authority to embark on these troublesome questions of political philosophy and political beliefs. The first point leads to and illustrates the danger of the practices considered more generally under the second point.

. . . [The case raises interesting constitutional questions.] There is some force to insistence on the language carefully limiting the court's opinion [in the *Douds* case] that labor leaders might be required to take a non-Communist oath as a condition of enjoying the facilities furnished by the National Labor Relations Act and the National Labor Relations Board. It is true that a lawyer is not a public official in any of the usual categories, legislative, administrative, executive, and judicial, and that decisions with respect to public employees and officials in those categories do not control questions about admission to the bar. The decision against the Communist leaders convicted under the Smith Act deals in terms only with the teaching and advocacy of violence practiced by leaders of the Communist Party, and there is a sentence in the [*Dennis* case] opinion of the Chief Justice which opens the way to distinctions in cases of members and perhaps still more in the cases of persons of whose membership there is no evidence, but who have refused to answer questions about it. Summers' case [325 U.S. 561] is different, in that it dealt with a belief which made it impossible, in the opinion of the Illinois Supreme Court, for Summers honestly to take the constitutional oath. As George says, the only belief which he has expressed which might be supposed to be dangerous is the belief in the right of revolution.

The right of revolution was consistently insisted upon by the medieval Church in its relationships with the princes

of the time with very practical consequences. The Pope promoted the first threat of rebellion of lords and bishops against King John, though by the time of Magna Carta he was on the King's side. The same pope, Innocent III, the most powerful pope in history, by encouraging rebellions in Germany checked the Hohenstaufen, Philip of Swabia; then destroyed the Pope's former protege, Philip's successor, the Emperor Otto of Brunswick; and finally left on the imperial throne Frederick II, "the wonder of the world," whose power was to be destroyed and his family obliterated by successor popes. The fascinating little volumes by Achille Luchaire dealing with the work and wars of Innocent III contain many other examples of the use of revolution by this revolutionary but conservative pope, as it was used indeed by the other great Hildebrandine popes, in their revolutionary struggle for papal supremacy in Europe.

The right of revolution was systematically developed by John Locke in his Second Treatise on Civil Government as a justification for the revolution which displaced James II and substituted William of Orange on the English throne. It was elaborately insisted on in the Declaration of Independence, which may be regarded as a constitutional document, perhaps even—as George urges—incorporated by reference in Amendment IX. It is still part of Catholic doc-
[fol. 519] trine and part of the justification and appeal of Catholic resistance to the authorities of the iron curtain countries. George's testimony contains a statement of the qualification insisted on by the classical writers on this subject, that the right of revolution should not be lightly exercised. In particular he testified that ~~he would not~~ think of advocating any revolution in the United States under anything like present circumstances.

There is a paradox in the theory of the right of revolution as in all natural rights theory. No state can as a matter of positive law recognize any such legal right in any sweeping form. It is to be noticed however that the body of traditional international law dealing with insurgency and revolution recognizes that insurgents and revolutionaries are not for example murderers or arsonists. After our Civil War, the distinction, though it may have been lost sight of in some prosecutions during the war, was expressed and ap-

plied by our Supreme Court. *Ford* v. *Surget*, 97 U.S. 594 (1878); see Wheaton, *Elements of International Law* (8th ed., Dana 1866), 377 n. (reports of the very questionable treatment of Confederate sailors as pirates in the early part of the war); and see Lauterpacht, *Recognition in International Law* (1948), 193 n.

The body of law here referred to goes as far perhaps as courts can go in recognizing the right of revolution. In important respects the right is not a legal right, as American revolutionists and Southern Confederates alike found when the force of the state was used against them. The philosophical right is of a different order from the legal right, but it has, as you know, played a large part in the history of freedom.

There is indeed, as we all know, one other paradoxical relationship between revolution and the law administered in the courts. As far as I know, all modern states, certainly all modern states of any consequence, have revolutions at their origin, in their successions, or as the source of their present constitutions. Professor Lauterpacht, in the book just referred to (see §40) deals with the brief life of the one modern attempt to crystallize the status quo, made by the Holy Alliance in the name of an almost rigid theory of legitimacy. The universal practice of mankind has been to treat the revolutions which characterize human history from the days of the Sumerian civilization, as accomplished facts and revolutionary governments as the creators of established law. So much is this the fact that the leading contemporary western philosophy of law, Professor Kelsen's "Pure Theory of Law," treats the power which makes successful revolution as the most important of the factors in an analysis of a stable legal situation. The philosophical right of revolution perhaps has something to do with the attitude necessarily assumed by states toward successful revolutions in or against other states. More practical considerations, having to do with the preservation of means of trade and international political stability, doubtless make a contribution of equal importance to the practices and traditions governing the recognition of new states and new governments.

[fol. 520] [Letter to George Anastaplo at Paris, August 7, 1951]

You asked about my belief that you have a good case on the issue about your moral character and good citizenship, if nothing else. I infer from the circumstances that you have gotten this far, that there is in your record plenty of evidence, including the usual affidavits, of moral character and good citizenship. There is, as I read the record, no single item of evidence, taken in context, which creates any inference that you are a Communist or that you are non-cooperative in any significant sense. Each item of evidence read in context is quite consistent with the character we know, a lively, intelligent, public-spirited, determined and thoroughly well-qualified fellow, who ought to make an excellent citizen and an unusually good lawyer.

We are not arguing the question of whether you are or are not a Communist, or presenting any more data on that issue. I am dealing simply with the record as it is.

Knowing something about human nature and the enthusiasm of heresy hunters, we may perhaps suppose that the Committee depends for its conclusion on three or four lines of questions and answers about which my letter [of March 26, 1951] speaks, and which we have discussed so often. I should think these questions in the state of your record were all quite improper, and the answers irrelevant, under the Supreme Court's rules. We may concede for the sake of argument that there may be some case in which the question whether a man is a member of the Communist Party would be relevant to the inquiries of the Committee, although we need not try to imagine just what that case would be. I cannot believe that there is any justification for the Committee's asking boys generally out of a clear sky whether they think Communists should be allowed to practice; which leads in your case to a discussion of the philosophical and political doctrine of the right of revolution common to Catholics, Jeffersonians and Communists alike; and finally to the question whether you are a Communist and the subsidiary question whether you have subscribed to the Daily Worker. The Committee is undertaking to decide for itself the question of the requirement of

an anti-Communist oath for admission to the Bar, and to go beyond a favorable decision on this issue, to decide that the Committee is in fact authorized to conduct general loyalty investigations of applicants for the Bar.

While the majority of the Bar Association followed some excited Texans last fall in approving the oath, such eminent lawyers as Mr. Chafee, Mr. Grenville Clark and Mr. Laird Bell have sharply questioned its desirability. One advantage of the oath over such inquiries as those of the Committee is that at least it appears in print where its content can be examined and checked by interested people. If the Bar Association Committee thinks that applicants should take an oath that they do not believe in the right of revolution, that should certainly be made a matter of printed record, and the terms of the oath should be carefully defined. I should think that the Supreme Court would want to decide itself whether its subordinate agencies are to make such requirements, and the precise terms of the requirements which are to be made. . . .

—Malcolm Sharp

[fol. 521] Before the

Committee on Character and Fitness
First Appellate Court District of Illinois
29 South LaSalle Street
Chicago 3, Illinois

In re George Anastaplo,
Applicant

SUPPLEMENTARY PETITION FOR REHEARING

In compliance with the ruling of June 12, 1957 by the Committee on Character and Fitness, I am submitting answers to the two interrogatories put by the Committee.

A. Answer to interrogatory asking about,

"Applicant's willingness to answer questions heretofore asked (but not answered) in the prior proceedings, which questions were deemed pertinent and proper by the Illinois Supreme Court (In re Anastaplo, 3 Ill.2d 471)."

I was asked, during appearances before the Committee, the following questions which I was unwilling to answer:

i. what organizations I belonged to;

ii. whether I belonged to any organization on the Attorney-General's "list" of "subversive organizations";

iii. whether I belonged to the Communist Party;

iv. whether I belonged to the Ku Klux Klan;

v. whether I had ever subscribed to *The Daily Worker;*

vi. whether I subscribed to *The Chicago Tribune.*

I respectfully advise the Committee that I must continue to leave these questions, and questions of this kind, unanswered.

My reasons for refusing to answer such inquiries challenge not only the relevancy of the inquiries and their validity under the state and federal constitutions, but also their foundation in the Record and their applicability to my application. I believe that an unwillingness to answer any of these questions should raise, in this context, no doubt about my character and fitness to practice law, particularly when these refusals on principle are seen against the bulk of the favorable evidence in the Record. I would like the Committee to rule at this time that I am, on the evidence in the Record which I am prepared to add to, entitled to admission to the bar.[1]

[fol. 522] This Supplementary Petition is intended primarily to answer the interrogatories asked by the Committee rather than to set forth the constitutional arguments which I am prepared to make whenever the Committee thinks it appropriate to receive them. It would be no

[1] I should, like to emphasize, lest I be thought to waive them, the claims heretofore made to rights guaranteed by the First Amendment and the Fourteenth Amendment—rights to freedom of speech, of the press, of assembly, and to due process of law and the equal protection of the laws, all of which rights seem to me to be infringed or abridged unconstitutionally by my continued exclusion from the bar.

service to the Committee, therefore, to repeat at this time the various arguments I have made to explain and justify my unwillingness to answer questions such as those I have heretofore not answered. I would only call the attention of the present Committee to the reasons given in the Record as well as in the papers filed in the Supreme Court of Illinois and the Supreme Court of the United States for my refusal to answer certain questions.[2]

I should like to note at this time, however, that these arguments are affected by several decisions of the Supreme Court of the United States delivered this term of court. As the Committee knows, the Supreme Court of Illinois (3 Ill.2d 471), in upholding the action of the Committee in refusing to certify me for admission to the Illinois bar, chose to pay special attention to my refusal on principle to say whether I was a Communist. Subsequent developments hold out hope that my refusal to say whether I am or am not a Communist should not prevent either the Court or the Committee from concluding that I am fit to practice law.[3] In particular, we now have the recent decisions in *Konigsberg* v. *State Bar of California,* 353 U.S. 252, and *Schware* v. *Bar Examiners of New Mexico,* 353 U.S. 232, which seem to provide strong constitutional support for my position.[4]

---

[2] I have extra copies of these documents which I can place at the disposal of the Committee.

[3] Several commentators, in diverse legal publications, have agreed that, whatever the legal problems involved, my qualifications for the practice of law are not really questionable on the record. See, for instance, the conclusions of a chairman of a committee on character and fitness in a neighboring state, Starrs, 18 Univ. Detroit L. J. 195, 216 (March, 1955). See, also, Sharp, 17 Lawyers Guild Rev. (Summer, 1957); Sharp, 16 Lawyers Guild Rev. 1, 2 (Spring 1956); Note, 50 Northwestern Univ. L. Rev. 94 (March-April, 1955). Cf. Note, 1955 Washington Univ. L. Q. 83 (Feb., 1955); Note, 2 UCLA L. Rev. 224 (Feb. 1955).

[4] The Court held, in the *Schware* case, that "A State cannot exclude a person . . . in a manner or for reasons that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment." The Court there noted that "We need not enter

[fol. 523] Neither the Court nor the Committee has ever ruled that my refusal to answer questions is in itself evidence of bad character or that my refusal to answer certain questions simply obstructed the processes of the Committee. Rather, they seemed to say that certain unfavorable inferences *might* be drawn from a refusal, by an applicant who had expressed certain opinions about the "right of revolution", to answer certain questions.[5] My views about the right of revolution are the only possible justification for questions about my other views, my associations and my subscriptions. Since my position about the right of revolution is the one traditional in the United States, it follows that the questions about other matters have no better standing than questions asked at random and with-

---

into a discussion whether the practice of law is a 'right' or a 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace." 353 U.S. 238-239.

In addition, *Service* v. *Dulles*, 25 L.W. 4494, points up the significance of following procedures and regulations laid down, even when the case involves the discharge (on loyalty grounds) of an employee of the government. So far as is known, I am the only applicant in the history of bar admission examinations in Illinois to have his application handled as mine was.

[5] In the *Schware* case, 353 U.S. 232, a bar admission applicant who was known to have been for seven years a member of the Communist Party was treated with much more respect for his constitutional rights than I was, even though there is no evidence at all in my record of such affiliation or no claim on anyone's part to that effect. In that case, the Court said, "There is nothing in the record, however, which indicates that he ever engaged in any actions to overthrow the Government of the United States or of any State by force of violence, or that he even advocated such actions. Assuming that some members of the Communist Party during the period from 1932 to 1940 had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct. . . . We conclude that his past membership in the Communist Party does not justify an inference that he presently has bad moral character." 353 U.S. 245-246.

out any indication that they were relevant to questions seriously under consideration by the Committee.[6]

[fol. 524] It is respectfully suggested that the decisions in the *Konigsberg* and *Schware* cases make it constitutionally invalid to rely upon the kind of inferences referred to by the Committee and the Court as the crucial link in the chain of reasoning heretofore used to justify my exclusion from the bar. These inferences are from a refusal, which is neither frivolous nor in bad faith, to answer certain questions. The *Konigsberg* ruling,[7] it seems, is especially applicable to a case such as mine where there is only an abundance of favorable evidence in the record and, except that which a principled refusal to answer certain

---

[6] If the truth bears repetition, it cannot be said too often that there is nothing in the Record adverse to me, and that the Committee was originally moved to inquire into my political affiliations or lack of them only because of my determined defense of the right of revolution. In this connection, I must call attention to a serious error in fact that the Supreme Court of Illinois was permitted to make in its review of my matter (3 Ill.2d, at page 474). The Court there found that inquiries into my opinions came only after and because of my refusal to answer certain questions about political affiliations. Of course, the opposite is true: this is not a matter upon which the Record leaves any doubt; and it is a point which may be relevant to consider at this time.

See, in this connection, *Sweezy* v. *New Hampshire*, 25 L.W. 4526, at 4531, where the Court seems to point to the need to lay a foundation for questions that, on their face, invade constitutional rights. In my matter, there was absolutely nothing in the Record that justified asking about my affiliations, nothing, that is, but my opinions about the right of revolution which, it is submitted, provide no constitutionally-sanctioned foundation for questions about political affiliations and newspaper subscriptions.

Even today, seven years after I first appeared before the Committee, there is still no reason to ask me questions about affiliations, questions which are asked, so far as is known, of no other applicant for admission to the bar. Yet, it would seem that these questions invade constitutional rights and therefore call for justification, as well as for foundation in the Record.

[7] For the convenience of the Committee, the syllabus of the *Konigsberg* opinion, which seems a fair summary as well as the official one, is reproduced in the Appendix to this Petition.

questions asked without foundation may provide, no evidence adverse to a showing of satisfactory character and fitness. I have referred, in my Petition for Rehearing, to activities and available character references that provide additional favorable evidence.[8]

B. Answer to interrogatory asking about,
"Applicant's present views with respect to the overthrow of government by force."

The fact that the Committee has asked once again about my "present views with respect to the overthrow of government by force" makes me apprehensive that a misunderstanding of my views may again lead to my exclusion from the bar.[9] As the Committee knows, I have doubts about the wisdom and about even the constitutionality of inquiries into such matters. But, as the Committee also knows, I have freely discussed my ideas about "the right of revolution" as well as my reasons for being unwilling to answer certain questions about political affiliations and newspaper subscriptions. This cooperation was motivated, in part, by a desire not to be thought simply "contrary" or obstructive to the process of the Committee, and, in part, by the desire to eliminate any doubt about my willingness and ability to take the required constitutional oath in good faith.

Before I indicate some of the implications of my views with respect to the overthrow of government by force—

---

[8] Since filing that Petition, I have been appointed permanent Judge of Elections in my precinct by the Cook County Board of Election Commissioners. I served in that capacity during the recent Judicial Election. My commission provides that I am "considered an officer of [the County Court of Cook County] while serving this appointment."

[9] *Yates et al.* v. *United States*, 25 L.W. 4475, reaffirms the "distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action." "Mere doctrinal justification of forcible overthrow" does not seem to be punishable under the Smith Act or any other law of the United States.

"the right of revolution"—, I should like to emphasize that these views are set forth, much better than I can ever hope to, in The Declaration of Independence. Everything I have ever said to the Committee or to the Court on these matters was intended to be consistent with that document.

[fol. 525] Almost everyone would agree there are times when a government should be overthrown by force. Ultimately, a citizen has to decide for himself when such a time comes—when the principles of The Declaration of Independence apply. The conscientious citizen reserves the right and duty to judge his government even as he takes the oath to support not that government but the Constitution. In fact, our Constitution can be said to have this right implicit in it, a right that protects the Constitution itself from subversion by a government that may be constitutional only in appearance. But, as I said when I first appeared before the full Committee on January 5, 1951, I do not think anyone would be justified at a time such as this, when the normal processes of government permit reasonable and peaceful change, to participate in action leading to the overthrow of government.

The right of revolution, as I understand it, is something that probably all the members of the Committee on Character and Fitness and of the Supreme Court of Illinois believe in. The Committee must realize that I would be no less reluctant than they to see this right of revolution exercised except in the most extreme circumstances. I trust that my position, and what I have contributed to its defence, indicate an abiding commitment to constitutional government.

Respectfully submitted,

George Anastaplo,
Applicant, Counsel *pro se*

25 June 1957

Affidavit Required by Rule 12

I hereby certify that I have prepared this Supplementary Petition for Rehearing.

I further certify that everything in this Petition is true, to the best of my knowledge, and that the petition is presented in good faith and for the relief requested to which I think I am entitled.

George Anastaplo,
Applicant, Counsel *pro se*

George Anastaplo
6030 Ellis Avenue
Chicago 37, Illinois
Dorchester 3-4825

25 June 1957

[fol. 526] [Supplementary Petition]

APPENDIX

Konigsberg v. *State Bar of California et al.* Syllabus found at 353 U.S. 252 (Preliminary Print). (Decided May 6, 1957)

In 1954 the Committee of Bar Examiners of California refused to certify petitioner to practice law in that State, though he had satisfactorily passed the bar examination, on the grounds that he had failed to prove (1) that he was of good moral character, and (2) that he did not advocate forcible overthrow of the Government. He sought review by the State Supreme Court, contending that the Committee's action deprived him of rights secured by the Fourteenth Amendment. The State Supreme Court denied his petition without opinion. *Held*:

1. This Court has jurisdiction to review the case, and the constitutional issues are properly here. Pp. 254-258.

2. The evidence in the record does not rationally support the only two grounds upon which the Committee relied in rejecting petitioner's application, and therefore the State's refusal to admit him to the bar was a denial of due process

and equal protection of the laws, in violation of the Fourteenth Amendment. Pp. 258-274.

(a) That petitioner was a member of the Communist Party in 1941, if true, does not support an inference that he did not have good moral character, absent any evidence that he ever engaged in or abetted or supported any unlawful or immoral activities. Pp. 266-268.

(b) An inference of bad moral character cannot rationally be drawn from editorials in which petitioner severely criticized, *inter alia*, this country's participation in the Korean War, the actions and policies of the leaders of the major political parties, the influence of "big business" in American life, racial discrimination, and this Court's decision in *Dennis* v. *United States*, 341 U.S. 494, and other cases. Pp. 268-269.

(c) On the record in this case, inferences of bad moral character from petitioner's refusal to answer questions about his political affiliations and opinions are unwarranted. Pp. 269-271.

(d) There is no evidence in the record which rationally justifies a finding that petitioner failed to show that he did not advocate forcible overthrow of the Government. Pp. 271-274.

Reversed and remanded.

[fol. 527] July 2, 1957

ORDER OF THE COMMITTEE

IN RE GEORGE AN STAPLO, APPLICANT

This cause coming on to be heard on the sworn supplementary petition for rehearing and discussion having taken place by the Commissioners and

The Commissioners having before them the original record, the original petition for rehearing and supplementary petition of applicant, and it appearing to the Commissioners that except as supplemented to date by insignificant facts pertaining to applicant's life, the matter is virtually

in the same posture as it appeared before the Illinois Supreme Court, and the Committee is of the opinion it has no alternative but to deny the said petition.

Now therefore, it is ordered that the supplementary petition of applicant be and the same is hereby denied on the authority of *In Re Anastaplo, 3 Ill. 2d 471.*

By order of the Committee

Richard H. [redacted]
Secretary

[fol. 528] COPY

5717 South Dorchester Avenue
Chicago 37, Illinois
May 31, 1959

The Supreme Court of Illinois
Springfield, Illinois

In re: George Anastaplo, Application for Admission to the Bar of Illinois

Your Honors:

It has been my good fortune to know George Anastaplo rather well in professional and non-professional connections for more than eleven years. I believe I have read, though not studied, almost every line of the long record of his matter. I am not a lawyer. I am a teacher and student. I received a Ph.D. from the University of Chicago in 1957. Politics and political philosophy have been at the center of my studies for over fifteen years and it is on a few questions of politics and political philosophy that I think I might have something to say of interest to this court.

It is not my main intention to speak about George Anastaplo's character. To praise my friend publicly would be embarassing for us both. For a man whose everyday

behaviour constantly bespeaks his rectitude to be placed in a position where it appears as if his character and behaviour need justification can only be obnoxious. I would not add to my friend's discomfort.

In preparation for teaching assignments recently I had occasion to make some brief studies of the Declaration of Independence, the Constitution of the United States and certain speeches of Abraham Lincoln. I became aware that Lincoln's remark at Independence Hall in Philadelphia in 1861: "I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence."—that this remark was not a mere rhetorical effusion but a carefully considered statement. This led me to think, quite naturally, of Mr. Anastaplo's oft-repeated statement in this record that his bar admission difficulties stem primarily from the fact that he takes the principles of the Declaration of Independence seriously, whereas those denying him admission do not take those principles seriously. As a result of these readings the grounds of that contention became much clearer to me. And Mr. Anastaplo's procedure as a whole in this matter appeared much more plausible and sensible to me than it had ever appeared before. I began to see how a man who had learned from Lincoln to take the principles of the Declaration of Independence seriously might well feel that he could act in no other way than Mr. Anastaplo acted. I thought the Court might be interested in hearing the reasons for these opinions.

Lincoln understood, perhaps better than any other American statesman, the connection between morality and government. The best constitution, laws and governmental institutions, he suggests, can endure and thrive only if supported by what is more fundamental than any legal enactment, the moral sense of the people. He was aware that any system of laws and institutions can be perverted and misused by vicious and clever men. He devoted by far the largest part of his energy and great talents to creating the conditions which would make such a calamity impossible as far as the Constitution and free republican

[fol. 529] government in the United States were concerned. "Let reverence for the law .... ," he declared, "become the political religion of the nation." Constitutions and governments are made by men. That moral sense upon which the endurance of good government depends requires a devotion sanctioned and hallowed by authorities higher by far than any human authority: such authorities, the Declaration informs us, are "the Laws of Nature and of Nature's God." Those natural rights embodied in the Declaration, he said, were the animating principles of the Constitution and free government in the United States. The purposes for which governments are instituted, the Declaration asserts, are more important than any particular form of government. Upholding the Constitution, then, depends upon supporting the principles of the Declaration. This is a practical matter. Reverence for such principles and purposes, Lincoln taught, even more than any institutionalized check and balance system, is the primary safeguard of free government in the United States. Of the authors of the Declaration he said:

> They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in "certain inalienable rights, among which are life, liberty and the pursuit of happiness." This they said and this they meant. . . . They meant simply to declare the *right* so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which could be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people of all colors everywhere. . . . Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant when such

should reappear in this fair land and commence their vocation they should find left for them at least one hard nut to crack.

"Four score and seven years ago," refers not to 1787 but to 1776, the date of the Declaration. The final paragraph of the Constitution itself which dates the independence of the nation from the time of the Declaration tends to support Lincoln's use of the Declaration as evidence for determining "the intention of the legislator" in constitutional questions. Dedication to the principles of the Declaration cannot help but have a decisive effect upon anyone's "attitude toward established authority and orderly governmental procedures." (Majority Report of the Committee on Character and Fitness, April 9, 1959, p. 8.) One of the practical conclusions of such an understanding of the principles of government is the right to revolution.

Mr. Anastaplo's discussion of the right to revolution as expressed in the Declaration leaned in the direction of conservatism. Whether rightly or wrongly the most hallowed and authoritative statement of American principles of government speaks not only of a right to rebel but even of a duty to rebel. Fully cognizant of the dangerous effect of unqualified expressions of a right to rebel, the Declaration, followed by Mr. Anastaplo, spells out the extraordinary conditions which must prevail before the exercise of that right can be reasonable and legitimate. Why are public acknowledgements of that right important even when the conditions for the exercise of the right do [fol. 530] not exist? Because they remind us in the most dramatic way of those higher standards of justice and principles of right which all good government must measure up to and ought to be guided by. Furthermore, such acknowledgements remind us that no particular government is sancrosanct, or as important as the principles of good government themselves. To borrow two phrases from Lincoln, they remind us of those principles which alone can transform "dry legal obligation" into "reverence for law." Laxity, neglect and the forgetting of our highest principles

lead to a lowering of the standards of everyday political practice and, finally, pave the way for despotism. Lincoln, perhaps the most sober of American statesmen, acknowledged that right in the most public of forums, in his first inaugural address, at a time when a dangerous and unjustified rebellion was actually in process of formation. Recent political events, the rise of intellectually fashionable relativism and the growing predominance of what Mr. Anastaplo has aptly described as the principle of "the easy way out" indicate that this is a time when such reminders of the ultimate principles of our government are sorely needed. At such a time to join in the swelling chorus of conformity, by denying the right to revolution and therewith implicitly the primacy of those natural rights which form the moral backbone of American government, could only be regarded by Anastaplo as an act of disservice to his country. The prospect of deriving personal profit from such disservice must have been utterly repugnant to him.

It must have seemed to Mr. Anastaplo that only two choices were open to him: 1) He could acquiesce in and thereby contribute knowingly to what for others was an unwitting subversion of the animating principles of constitutional government in this country, or 2) he could take a stand against that subversion on a platform shared by the most glorious figures of the American past. For a man with a "nice sense of honor" only one choice was possible.

Respectfully yours,

Laurence B. Berns

[fol. 531]

IN THE SUPREME COURT OF ILLINOIS

No. 780

In re GEORGE ANASTAPLO,
Application for Admission to the Bar of Illinois

MEMORANDUM—Filed June 11, 1959

Submitted *amici curiae*:

Harry Kalven, Jr., 1300 E. 48th St., Chicago 15, Illinois, Livingston 8-6420.

Roscoe T. Steffen, 5510 Woodlawn Ave., Chicago 37, Illinois, Midway 3-0498.

[fol. 532] Our purpose in submitting this informal memorandum is to be of such help as we can to the Court. We also are friends of the Applicant, whom we knew first as a law student at the University of Chicago, and we have followed with some concern the long course of his efforts since 1951 to become a member of the Bar of this state. We feel it is to the interest of all concerned, as we know the Court fully appreciates, that this matter be disposed of promptly, and with all fairness and justice.

We know that Applicant has been quite independent in his views; that he has insisted upon his position—stubbornly if you will—as a matter of principle, when he could easily have taken a more conformable course; and, that he has taken many hours of committee time, and that tempers have been ruffled. But, we also know that Applicant has acted in good faith and with dignity in an honest belief that he is right, and at considerable personal sacrifice to himself and his family.

We realize that the issue raised by the Applicant's stubbornness has its perplexities. We understand, of course, that admission to the Bar is a privilege to be granted by the State, on a satisfactory showing of good moral character. But we are convinced that Applicant has long since

[fol. 533] met any burden of proof in that regard. Indeed, his very adherence in this matter to what he regards as basic principles of good citizenship is a sure testimonial that he possesses in more than average degree the qualities of independence, intellectual honesty and moral courage that are the glory of the true lawyer.

We would emphasize that this Court has not only the responsibility for regulating entry to the Bar of Illinois but the full freedom to exercise that responsibility wisely. The present proceeding puts to the Court no technical and limited issue of review of a trial court; the Committee on Character and Fitness is an arm of this court to aid it in administering entry to the Bar of Illinois. While admission to the Bar is a privilege, we know that this Court would not willingly see a qualified applicant denied that privilege. We hold that this record now a' ndantly establishes that George Anastaplo is a qualified applicant.

In what follows it is proposed to organize the discussion around three principal points:

First, it is suggested that the Applicant has fully met the conditions stated in the Court's order of September 17, 1957.

Second, as we see it, there is nothing in any recent Supreme Court decisions which would justify the Committee in going beyond the Court's order, as it did.

Third, the reach of the 14th Amendment apart, this case puts a simple issue to this Court: not whether Illinois *can* bar George Anastaplo from the practice of law, but whether as a matter of State policy it *should* bar him. We urge that no State policy is served by any further denial of his application for admission.

[fol. 534] I

By its order of September 17, 1957, this Court directed the Committee on Character and Fitness to take evidence on the following matters and, if we understand the language correctly, on these matters only:

"The principal question presented by the petition for rehearing concerns the significance of the applicant's

views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California*, 353 U.S. 252 and *Yates* v. *U.S.*, 1 L.Ed. 1356, 77 S.Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation."

The Committee was further directed to report the evidence it might take and to state its conclusions thereon. This the Committee did by its report filed with the Court on April 9, 1959. While the Committee again denied the petition, this time by a vote of 11 to 6, a fair reading of the majority report indicates that it did so on grounds other than those left open to it by the Court's order of September 17, 1957.

Upon the first matter, that is the Applicant's views as to the overthrow of the government by force, the majority reported as follows:

"The views expressed by the applicant with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines." [Report Pp. 7-8]

Upon the second and third points, concerning the Applicant's activities since his petition was first denied, and [fol. 535] his present reputation, the report is equally favorable. The majority says this:

"Since applicant's original application was denied, he has been engaged principally in the academic life as an instructor and research assistant at the University of Chicago. From the character affidavits and reference letters which have been submitted to us, it would appear that the applicant is well regarded by his academic associates, by professors who taught him in school and by members of the Bar who know him

personally. We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group." [Report Pp. 4-5]

While this finding is stated in the negative, it would seem fair to say that the Court's second and third questions are also to be answered favorably to the Applicant. The majority seems to intimate that somewhere, someplace, there surely must be some evidence of disloyalty or of bad reputation, but the fact is that in seven or eight years of investigation and inquiry, nothing of the sort has come to light.

Thus the applicant has brought himself well within the law of *Konigsberg* v. *State Bar of California* (1956) 353 U.S. 252, and this Court's order of September 17, 1957. Indeed, as this Court no doubt fully recognized when deciding on the scope of its order, Applicant's position here is far stronger than that of Konigsberg. In that case, there was some evidence at least of applicant's tie to the Communist party; here there is no suggestion in the record—or so far as we know, anywhere else—that the Applicant was ever a Communist or a member of any subversive organization. The Committee itself now agrees that [fol. 536] his views on the right of revolution are consistent with those of "many patriotic Americans both at the present time and throughout the course of this country's history . . ."

We submit, therefore, that without more the Court should now, consistently with its order of September 17, 1957, grant the applicant's petition for admission to the Illinois Bar.

[fol. 537] II.

It is apparent from the Committee report of April 9, 1959, that the Committee did not confine its inquiry to the questions stated in the Court's order of September 17, 1957. On the contrary, it devoted many hours, in meeting

after meeting, to what it regarded as a more important matter, that is, "the applicant's continued refusal to answer questions regarding possible Communist or other subversive affiliations." (Report p. 10) The Committee says it "felt justified" in doing this because: "The Committee believes that its right to question the applicant on possible subversive affiliations has not been foreclosed by the *Konigsberg* decision." (Report p. 10).

This is a strange situation. Of course the Committee's right to question an applicant upon "possible subversive affiliations" was not "foreclosed" by the *Konigsberg* case. In fact the majority opinion in order to reach the point on which the case was decided expressly assumed arguendo the propriety of questioning an applicant on such matters. A point might be made that in *Konigsberg* a proper foundation had first been laid for such questioning, since the record showed some possibility of a Communist tie, while here the record is bare of any such evidence, but we do not insist upon it. Our point is that the Committee raised a false issue when it sought to justify its departure from the Court's order by saying its "right to question" the applicant was not foreclosed by *Konigsberg*.

The issue here—and in *Konigsberg*—is plainly quite different. That is, granting the propriety of such questions, [fol. 538] the issue here—as in *Konigsberg*—is whether the Committee may properly draw an inference of bad moral character from an applicant's refusal to answer. And, here, it is fair to say the Committee is "foreclosed" by the *Konigsberg* case. Moreover, the Committee understood that it was, for it quite properly said [Report p. 13]:

> "We read the *Konigsberg* case to hold that a committee performing functions similar to our own is not entitled to draw an inference of bad moral character merely from the applicant's refusal to answer questions concerning membership in the Communist Party if such refusal is based on a good faith belief that the United States Constitution prohibited the type of inquiry which the Committee was making and if the reviewing court can 'find nothing in the record which indicates that his position was not taken in good faith.' (353 U.S. at p. 270)"

We assume that this Court also so understood the holding in *Konigsberg*, and for that reason limited its order of September 17, 1957, as it did. For the Court's silence on the questions about Communist affiliations was conspicuous.

Why, then, did the Committee persist in asking the same line of questions over and over, meeting after meeting? If, on this record, no inference of bad character could properly be drawn from the Applicant's refusal to answer such questions in the years prior to September 17, 1957, by what reasoning could it be supposed that such an inference could properly be drawn from his refusal to answer such questions after that date?

The most charitable answer is that the Committee sought to test whether the Applicant's refusal was based on a "good faith" adherence to principle. It is true we find nothing in the Committee's report to indicate that such was its purpose. And, moreover, we assume that this Court has satisfied itself of the applicant's good faith on the basis of the record prior to September 17, 1957. Neverthe- [fol. 539] less whatever its purpose, the Committee's action has surely set at rest any possible doubts as to the Applicant's good faith in refusing as a matter of principle to answer.

Perhaps the Committee majority was merely confused as to the proper scope of its inquiry. Certainly its resurrection of the *Rockafellow* case (1856, 17 Ill. 541), and its long and quite improper inquiry into Applicant's religious views, would bear that out.

But we think it fairly evident that the Committee persisted in its line of questioning from a stubborn refusal to be controlled by the *Konigsberg* case. If it could not properly draw inferences of bad moral character from the applicant's good faith refusal to answer its questions, it would nevertheless proceed to build a record of repeated refusal.

The Committee majority points to two decisions of the Supreme Court of the United States as confirming its action: *Lerner* v. *Casey*, 357 U.S. 468 and *Beilan* v. *Board of Education*, 357 U.S. 399. (Report p. 10) The Court will note that both these cases were decided on June 30th,

1958, that is, more than a month after the Committee had concluded its hearings in this matter.

If the cases sustain the Committee, it is only fair to say the Committee gives the unseemly appearance of being "saved by the bell," for it points to no other authority for its action. Unfortunately, after careful study, we believe neither case affords even belated justification for the Committee.

[fol. 540] It is not necessary to restate the *Beilan* and *Lerner* cases, since they are discussed at length in the Committee report. But it will be noted at the outset that both dealt with the duties of an employee to his employer, in the one case a subway conductor, in the other a public school teacher. In each, moreover, there was independent evidence of prior connection with the Communist party. In neither was the refusal to answer the employer's questions put on a matter of principle.

Surely it is not necessary to labor the point that these are important differences. Refusal on the part of an employee to answer any relevant questions has traditionally been equivalent to a lack of cooperation, if not of actual insubordination, on his part, and hence a basis for discharge. An attorney is not an employee but an officer of the Court. And it would seem to be unnecessarily demeaning to treat even an applicant for admission to the Bar as if he were a servant. We remind the Court of the language of Mr. Justice Black in *Konigsberg* (353 U.S. p. 273):

> "A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar."

In our view the applicant who has the independence of mind to stand firm on a question of Constitutional Law is to be commended, not arbitrarily rejected, even if his view differs from that of the Committee. Certainly his refusal to accept the Committee's view is no indication of bad character. But the *Lerner* and *Beilan* cases are not applicable

here for an even stronger reason. In those cases the petitioner was plainly warned in advance that failure to an-[fol. 541] swer the employer's questions would result in immediate discharge.

The significance of this point can be made clear beyond any question by quoting from the Court's opinion in *Konigsberg* [353 U.S. at p. 260-1]:

> "There is nothing in the California statutes, the California decisions, or even in the Rules of the Bar Committee, which has been called to our attention, that suggests that failure to answer a Bar Examiner's inquiry is, *ipso facto*, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners. Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable, and then giving him a chance to comply. In our opinion, there is nothing in the record which indicates that the Committee, in a matter of such grave importance to Konigsberg, applied a brand new exclusionary rule to his application—all without telling him that it was doing so."

This language makes it very clear that Mr. Justice Black put the *Konigsberg* case solely on the impropriety of drawing unfavorable inferences as to the applicant's character from his failure to answer proper questions. He found no authority in California—as we can see none here—which would give the Committee power to apply a brand new sanction on analogy to summary contempt. Therefore he could not say that the Bar Examiners had taken that course.

And it is equally clear that *Beilan* and *Lerner* are not in conflict with *Konigsberg*. There the employer was applying the traditional sanction of immediate discharge for failure, after due warning, to answer a relevant question. Mr. Justice Burton made this unmistakably clear in *Beilan* when he said, [357 U.S. at p. 409]:

[fol. 542] "In the *Konigsberg* case, supra, 353 U.S. at pages 259-261, 77 S.Ct. at pages 726-727, this Court stressed the fact that the action of the State was not based on the mere refusal to answer relevant questions—rather, it was based on inferences impermissibly drawn from the refusal. In the instant case, no inferences at all were drawn from petitioner's refusal to answer. The Pennsylvania Supreme Court merely equated refusal to answer the employing Board's relevant questions with statutory 'incompetence.'"

At page 18 of the Committee report, the majority state that Anastaplo was given adequate notice "of the consequences of a refusal to answer." Thus, in the opinion of the majority, their action in denying admission for a refusal to answer was brought within the *Lerner* and *Beilan* cases. But, even if we were to grant that the Committee had the power to impose "a brand new exclusionary rule" in Anastaplo's case without warrant of statute, without any case in support, without any order of this Court—which we do not—it is clear that the Committee wholly failed to warn him that a failure to answer its questions would, *ipso facto*, constitute a basis for denying his application. The Committee refers to two places in the record where its purported warning was given. It will be enough to refer to one, as the other is equally ambiguous. At pages 116-117 the following colloquy appears:

Commissioner Stephan: Now you have asked for a warning when we put a question to you that we think is pivotal, important question in connection with your qualifications. I must tell you that we consider that question, "Are you a member of the Communist Party", such a question; and that the refusal to answer it may have serious consequences to your application. I am not pre-judging you in this regard, and I haven't the slightest idea how any other member of the Committee is going to vote on this proposition. I have not, for that matter, made my own mind up as to how I am going to vote. But I can see that it would well be an important question in dealing with your qualifica-

[fol. 543] tions. I want you to understand that. That is not a frivolous position. I think it needs to be treated very seriously.

Do you want to make some statement?

Mr. Anastaplo: Yes, I would like to find out exactly what this entails. You are not suggesting that refusal to answer that question would *per se* block my admission to the bar?

Commissioner Stephan: No, I am saying your refusal to answer that question as to whether you are a member of the Communist Party, could and might.

Mr. Anastaplo: I see.

Now with all due respect to the Committee majority, this is a far cry from the type of warning considered in the *Konigsberg* case, or actually given in *Lerner* and *Beilan*. Of course the question, "Are you a member of the Communist Party?" was an important question, and in certain cases "could and might" be critical. But here it definitely was not asked in the context of *Lerner* and *Beilan*. Since we find in the record no other warning of the sort required, we conclude simply that these cases do not confirm the majority in its course of questioning. Indeed had it asked the type of peremptory question required, once would have been enough; it would not be necessary to drag out the inquiry hour after hour, and year after year.

We do not intimate that had the Committee given an adequate warning it would be safely within *Beilan* and *Lerner*. We do not see where the Committee on its own motion would have the power to make so substantial a change in Illinois policy; we do not see how such procedure could decently be applied retroactively to Anastaplo after all these years; and we do not see that *Beilan* and [fol. 544] *Lerner* put to rest the constitutional issues which Justice Black pointed out in *Konigsberg* would arise were the summary contempt analogy applied to applicants to the bar who, as a matter of good faith adherence to principle, decline to answer.

Thus, in the end it is as difficult to appreciate the Committee's reliance on *Beilan* and *Lerner*, as it is to under-

stand its dismissal of *Konigsberg*. The Committee majority has failed in two respects to justify its persistent questioning. On the one hand, it is abundantly clear on this record that no inference of bad moral character can be drawn from the Applicant's refusal to answer. On the other it has wholly failed to give the sort of warning required to bring itself within the summary contempt sanction of the *Beilan* and *Lerner* cases. Moreover it has made no showing that it has, or ever should have, the power to impose such a sanction, even if it should give adequate warning.

In view of the Committee's own handling of the *Beilan* and *Lerner* precedents, it adds a note of irony to the record that the majority make so much of Anastaplo's intransigence in failing to capitulate to their reading of the two cases.

[fol. 545] III

Finally we would emphasize that this court has control over and responsibility for entry to the Bar of Illinois. This Court is the final arbiter of policy in this area. We would stress that the difficulties which the constitutional issues may raise tend to divert attention from the simple issue of policy which this case puts to this Court. The question is not so much whether Illinois *can* constitutionally deny George Anastaplo admission to the Bar; the question is whether as a matter of policy Illinois *should* deny him. For surely, there are no constitutional obstacles in the path of this Court admitting him.

The Committee, as we have noticed, appear to us to have been wrestling with a false dilemma; either to deny Anastaplo or to admit that their questions about Communist affiliation were improper. And however much the committee may have been moved by the common sense appeal of Anastaplo's obvious character and fitness, they could not accept what they regarded as the necessary corollary—that their questions must have been improper.

But to state the issue this way, misconceives it. The ultimate issue is not whether the question was proper, but what weight is to be given to a refusal to answer it. The question which has been before this committee since 1951

then is not whether Anastaplo was right but whether, even if he was wrong about the propriety of the question, his principled good faith refusal to answer it is a sufficient basis for denying him admission to the Bar.

Thus put, the question, with all deference, seems to us notably easy to answer as a matter of policy. The acknowledged criteria for admission to the Bar of Illinois are intellectual and moral fitness. There can be no question [fol. 546] about Mr. Anastaplo's intellectual and academic achievements. And on this record there can be no question that his refusal to answer was not frivolous, not obstructive, not because of any fear of the truthful answer, but simply a refusal to answer a question which he deeply felt invaded basic freedoms. He has proved the depths of his conviction by continuing all these years to refuse to yield, by sacrificing some eight years of a promising professional career. He is therefore that familiar figure in American history—the conscientious objector. On this record he ought not be denied admission if the test is moral and intellectual fitness.

Should, however, Illinois as a matter of overall policy treat every refusal to answer a relevant and proper question as a summary grounds for denial? Should it do so on the policy grounds that no other rule can be effectively administered?

If the Court should now decide that this is to be the Illinois policy for future cases, there are impressive reasons why that policy should not be made to apply retroactively to Anastaplo. As a matter of decency, whether or not it is a constitutional compulsion, the Committee must give adequate warning that so drastic a sanction is to follow a refusal to answer and as we have shown above no such warning has been given in this case. Further, in view of its 1957 order, the Court, had it wished to make Anastaplo's refusal an automatic basis for denial of admission, would surely have told him in 1957. To do it now would make the second hearing unnecessary and would cost the applicant two more years of precious time. Finally, the Court should not now, after this eight year record, introduce such a requirement into the case. The applicant

is entitled to know of such a rule when he applies for admission, or better when he starts to study law, and not after eight years of controversy.

[fol. 547] But the argument against such a rule need not rest on its retroactive application to this case. The rule as a general rule, we submit, is unsound. It is unsound policy for the simple reason that on occasion it will result in denying admission to applicants who fully qualify on intellectual and moral grounds; it is unsound because it imposes a harsh and disproportionate penalty on analogy to contempt. It is unsound because it is unnecessary. Only in the very occasional case will an applicant who refuses to answer proper questions be able to meet the burden of proof of good faith. It should not be insuperably difficult for a committee whose job it is to assess good character to occasionally judge good faith. A less mechanical rule will not start a run on the bank and encourage applicants to refuse to co-operate with Bar committees. In fact all it will do, we predict, is to keep the committee from catching the admirable eccentric who for deeply held reasons may find a question improper. All a less mechanical rule will do is to keep the committee from tripping over any more Anastaplos.

The rule of law is always better when tempered with equity and we can think of no more suitable place for a discriminating use of equity than in regulating entry to the practice of law itself.

We respectfully urge therefore, that this Court adopt the powerful six man minority report of the Committee and admit George Anastaplo forthwith to the practice of law in Illinois.

Harry Kalven, Jr.
Roscoe T. Steffen

June 9, 1959

[fol. 549]

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

Nonrecord No. 780—Agenda 44—May, 1959.

In re George Anastaplo, Petitioner.

OPINION—November 19, 1959

Per Curiam: The present proceeding is a sequel to *In re Anastaplo*, 3 Ill.2d 471. George Anastaplo passed the Illinois bar examination given in August of 1950. Thereafter, following extended hearings before the Committee on Character and Fitness for the First Appellate Court District, the committee, on June 6, 1951, advised Anastaplo that he had failed to prove such qualifications as to character and general fitness as, in the opinion of the committee, would justify his admission to the bar of Illinois.

Anastaplo filed in this court a "Petition and appeal from the refusal of the Committee on Character and Fitness * * * to sign a favorable certificate for admission to the practice of law for the applicant and Motion to the Supreme Court of Illinois to provide for the admission of the applicant to the practice of law in the state of Illinois." For the reason that Anastaplo charged that the committee abused its discretion and that certain of his constitutional rights were infringed upon, we found that circumstances existed which should cause the matter to be set down for argument and opinion. (*In re Summers*, 325 U.S. 561, 89 L. ed. 1795, 65 S. Ct. 1307.) The matter was taken upon the record of the hearings before the Committee on Character and Fitness, the report of the committee, Anastaplo's brief and oral argument, briefs of two *amici curiae* and the suggestions of a one-time member of the committee in his behalf.

The crux of the earlier controversy centered upon Anastaplo's refusal to answer inquiries as to whether he was a member of the Communist Party or of any subversive organizations in a list compiled by the United States Department of Justice. When initially interrogated as to whether

he was a member of the Communist Party Anastaplo answered that the question was an inquiry into his political beliefs and an "illegitimate question." He made like responses to similar questions in other parts of the record. Based upon these refusals, the committee, upon the basis of its opinion that a member of the Communist Party, because of such membership, might not be able in good faith to take the oath of attorney to support the Federal and State constitutions, thereupon directed questions to Anastaplo to elicit his views in what the committee deemed were pertinent areas of inquiry. Questioning of Anastaplo brought out his [fol. 550] opinion that a member of the Communist Party, otherwise qualified, should be admitted to the practice of law and that he could see nothing contradictory or incompatible between adherence to tenets of that party and the taking of the attorney's oath to support the constitutions. Anastaplo expressed his belief in the doctrine of revolution and the overthrow of government by force of arms, saying that he would embrace such doctrine if he could not agree with the existing government, or found it unsatisfactory, and felt that force of arms was the only means to attain the end desired. He also stated that such view would not be altered even though the existing government provided for peaceful and orderly means of change. In its report denying Anastaplo a certificate, the committee stated that the views and opinions expressed by Anastaplo on these matters were not the basis of its decision, but that such views increased the importance of his refusal to answer and made more necessary a complete answer upon the subject of membership in the Communist Party, so that the committee could better determine the ability of Anastaplo to take the oath of attorney in good conscience and his good citizenship.

In his appeal to this court, Anastaplo contended that the committee abused its discretion and exceeded its function by inquiring into what he described as his "political views," directly or indirectly. We rejected this contention and held that the committee's inquiry into Anastaplo's membership in the Communist Party was relevant to a determination of his good citizenship and his ability to take the oath of a lawyer in good conscience, and that his constitutional rights

were not infringed upon. Accordingly, we concluded that "On the present record the petition must be denied." Anastaplo appealed to the United States Supreme Court, which treated the appeal as a petition for writ of *certiorari*, and denied the petition. (*In re Anastaplo*, 348 U.S. 946, 99 L. ed. 740.) The Supreme Court of the United States also denied Anastaplo's motion for admission to the bar of that court in 349 U.S. 903 (1955), 99 L. ed. 1240.

Upon the authority of *Dennis* v. *United States*, 341 U.S. 494, 95 L. ed. 1137, *American Communications Ass'n, C.I.O.* v. *Douds*, 339 U.S. 382, 94 L. ed. 925, and *In re Summers*, 325 U.S. 561, we held that inquiries to applicant by the committee concerning his membership in the Communist Party did not violate either the first or the fourteenth amendment to the Federal constitution.

On June 25, 1957, subsequent to the decisions of the [fol. 551] United States Supreme Court in *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 1 L. ed. 2d 819, 77 S. Ct. 722, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 1 L. ed. 2d 796, and *Yates* v. *United States*, 354 U.S. 298, 1 L. ed. 2d 1356, 77 S. Ct. 1064, Anastaplo filed with the Committee on Character and Fitness a supplementary petition for rehearing of his application for admission to the bar. On July 2, 1957, the committee denied the petition. Thereafter on September 17, 1957, we entered the following order:

"In 1951 the Committee on Character and Fitness for the First Appellate Court District denied the application of George Anastaplo for admission to the bar of Illinois. This Court affirmed the action of the Committee, (*In re Anastaplo*, 3 Ill. 2d 471,) and the Supreme Court of the United States denied certiorari. (348 U.S. 946.)

"Subsequently the applicant filed with the Committee a petition for rehearing on the basis of certain decisions of the Supreme Court of the United States. The Committee denied this petition.

"The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California*, 353 U.S. 252, and

Yates v. *United States*, 1 L. ed. 2d 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.

"We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions."

In obedience to the directions of this court, the committee requested Anastaplo to file the questionnaire required by the committee of all applicants for admission to the bar. Anastaplo's answers, in large measure, supplemented the answers given to the questionnaire filed with the committee on October 26, 1950. Anastaplo also supplied attorney's affidavits and character affidavits from persons acquainted with him. In addition, the committee received communications from various individuals whose names were given as character references by Anastaplo and who furnished information concerning Anastaplo's moral character and general fitness to practice as an attorney.

The committee conducted five extended hearings, com- [fol. 552] mencing February 28, 1958, and ending May 19, 1958. Anastaplo testified and argued at great length, as evidenced by approximately 420 pages of the record covering his oral testimony and argument. The record also contains law review articles, newspaper reprints, other exhibits, and letters from Anastaplo addressed to the committee. During the progress of the hearings, the committee repeatedly advised Anastaplo that he enjoyed the right to be represented by counsel and to call witnesses. He elected to submit his application solely upon his own testimony and argument.

During the interval between denial of his original application and the submission of his second application, Anastaplo had been employed the greater part of the time as an instructor and research assistant at the University of Chicago. The character affidavits and letters of reference supplied by Anastaplo disclose that he is well regarded by his academic associates, by professors who taught him in school and by lawyers who are personally acquainted with him. The committee says that it has not been supplied with

any information by any third party which is derogatory to Anastaplo's character or general reputation, and that it has received no information from any outside source which would cast any doubt on Anastaplo's loyalty or which would tend to connect him in any manner with any subversive group. The committee further advises us that it has conducted no independent investigation into Anastaplo's character, reputation or activities. For the very practical reason that the committee has no personnel or other resources for any such investigation, the committee states that it has traditionally asserted the view that it cannot be expected to carry the burden of establishing, by independent investigation, whether an applicant possesses the requisite character and fitness for admission to the bar and that a duty devolves upon the applicant to establish that he possesses the necessary qualifications and that it is then the duty of the committee to test, by hearings and questioning of the applicant, the worth of the evidence which he proffers. We agree, and have held that the discretion exercised by the Committee on Character and Fitness will not ordinarily be reviewed. *In re Frank*, 293 Ill. 263.

The committee conducted an extensive inquiry into Anastaplo's belief in the right to overthrow the government by force and violence. His testimony in this regard does not require narration since a majority of the committee concluded that while the views expressed by Anastaplo, while [fol. 553] strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines. Accordingly, the committee quite properly decided that although, in the light of the quoted conclusion, there was no need to consider in this connection either *Yates* v. *United States*, 354 U.S. 298, or *Konigsberg* v. *State Bar of California*, 353 U.S. 252, the *Konigsberg case* necessarily required consideration, with respect to the committee's authority to ask Anastaplo questions concerning Communist or other subversive affiliations and activities.

The committee regarded Anastaplo's views bearing upon

his attitude toward established authority and orderly governmental procedures as relevant to an inquiry into his character and fitness for admission to the bar. First, Anastaplo declined to deny that circumstances might exist under which he would resist by force Federal or State officers seeking to enforce judgments or decrees in proceedings against him personally which had become final after full review by the highest court having jurisdiction. Anastaplo testified: "I would not care to say there might not be instances where resistance to an officer of the law executing such a mandate might not be improper." He testified, further, that if admitted to practice and advising a client, he would not advise the client to resist by force or other similar means a final judgment or decree against the client, because, in his opinion, it was his duty to advise the client only "with respect to the legal system as it exists. In so far as I am a lawyer, I can tell him what his rights are under the accepted law * * * under the Canons of Ethics I would be derelict in my duty if I presume to do much more than that." Although disclaiming that he was arrogating to himself rights or privileges which he would deny to others as "citizens," he testified that "If, however, he [the client] were thereupon to approach me on some other basis, not as an attorney, there may be other advice I would be willing to give him." Anastaplo asserted that he saw no inconsistency between such an opinion and the taking of an oath to support the Federal and State constitutions "without any reservations whatsoever."

The foregoing views, according to the committee's report, raise a serious question whether the attitude expressed [fol. 554] by Anastaplo toward final court determinations binding upon himself and towards attempts to enforce them conformably to the law is consistent with the oath required of attorneys in this State. An attorney is an officer of the courts. (*In re Day*, 181 Ill. 73.) In *Cooper* v. *Aaron*, 358 U.S. 1, 3 L. ed. 2d 5, the United States Supreme Court said, at page 8: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."

The committee's report also suggests that Anastaplo's attitude with respect to advising others along the same sub-

versive lines in his capacity as "citizen" in contradistinction to his capacity as "attorney" raises additional serious questions concerning his capacity to take the oath required of attorneys in this State. See: *In re Anastaplo*, 3 Ill.2d 471, at page 479.

The major issue presented to the committee arose from the applicant's continued refusal to answer questions regarding possible Communist or other subversive affiliations. In our first opinion in this case, we said in 3 Ill.2d 471, at page 478:

"Neither the committee nor this court, faced with the question of whether membership in the Communist Party is relevant to a determination of petitioner's good citizenship and his ability to take the oath of lawyer in good conscience, need be oblivious to the existence of that party and its establish conspiratorial nature, nor to the view in which it is held by the people of this country. Aside from the fact that membership in an organization advocating the forceful overthrow of our government would give rise to questions concerning the sincerity of an applicant's oath of loyalty, it is proper to consider that the lawyer, as an officer of the court, holds a position of public trust, or at least of semipublic trust. * * * While technically not a governmental employee, a lawyer meets on common ground with one so employed, in that loyalty to the constitution is an inalienable condition to their service. In either case, Communist Party membership or communist activity is totally incompatible with such loyalty.

"It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if [fol. 555] accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis,

therefore, questions as to membership in the Communist Party or known subversive front organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate."

We reaffirm our adherence to the foregoing views.

In *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), 97 L. ed. 842, the petitioner, who had been inducted under the Doctor's Draft Act, brought *habeas corpus* proceedings for his discharge from Army because he had not been assigned to the specialized duties nor given the commissioned rank to which he claimed to be entitled by the circumstances of his induction. The petitioner had refused to answer the question "Are you now or have you ever been a member of the Communist Party, U.S.A., or any Communist Organization?" in connection with his application for a commission. In affirming the denial of the writ, the Supreme Court (Justice Jackson) said at page 91: "Could this Court, whatever power it might have in the matter, rationally hold that the President must, or even ought to, issue the certificate to one who will not answer whether he is a member of the Communist Party? It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertion by Communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question "No."

In *Lerner* v. *Casey*, 357 U.S. 468 (1958), 2 L. ed 2d 1423, petitioner, a subway conductor in the New York City Transit System, was discharged by his employer under the New York Security Risk Law on the ground that his re- [fol. 556] fusal, based upon the privilege against self incrimination guaranteed by the fifth amendment, to answer a question of his employer as to his membership in the Com-

munist Party, showed that he was of doubtful trust and reliability. Petitioner sued in the New York State court for reinstatement, attacking his discharge on various grounds, including lack of due process. The New York supreme court dismissed the suit and the Appellate Division and Court of Appeals both affirmed. On *certiorari*, the United States Supreme Court also affirmed. Justice Harlan for the majority said, at pages 476-8:

"In other words, we read the court's opinion as meaning that a finding of doubtful trust and reliability could justifiably be based on appellant's lack of frankness, *cf. Garner* v. *Board of Public Works*, 341 U.S. 716; *Beilan* v. *Board of Public Education*, *ante*, p. 399, decided today, just as if he had refused to give any other information about himself which might be relevant to his employment. It was this lack of candor which provided the evidence of appellant's doubtful trust and reliability which under the New York statutory scheme constituted him a security risk. The Court of Appeals went on to reason that had appellant refused, without more, to answer the question, the finding of 'doubtful trust and reliability' would have undoubtedly been permissible, and that the basis for such a finding, in appellant's refusal to answer, was not destroyed by the claim of the Fifth Amendment privilege because the Commissioner was not required to accept that claim as an adequate explanation of the refusal.

"Accepting, as we do, these premises of the state court's opinion, we find no constitutional block to its decision sustaining appellant's dismissal from employment * * *. Nor, as the Court of Appeals stressed, was the claim of possible self-incrimination made the basis for an inference that appellant was a Communist and therefore unreliable. Hence we are not faced here with the question whether party membership may rationally be inferred from a refusal to answer a question directed to present membership where the refusal rests on the belief that an answer might incriminate, *cf. Adamson* v. *California*, 332 U.S. 46, or with the question whether membership in the Communist Party which might be 'innocent' can be relied upon as a ground for denial of state employment. *Cf. Wieman* v. *Updegraff*, *supra*; *Konigsberg* v. *State Bar of California*, 353 U.S.

252; *Schware v. Board of Bar Examiners*, 353 U.S. 232. [fol. 557] "We think it scarcely debatable that had there been no claim of Fifth Amendment privilege, New York would have been constitutionally entitled to conclude from appellant's refusal to answer what must be conceded to have been a question relevant to the purposes of the statute and his employment, *cf. Garner v. Board of Public Works, supra*, that he was of doubtful trust and reliability. Such a conclusion is not 'so strained as not to have a reasonable relation to the circumstances of life as we know them.' *Tot v. United States*, 319 U.S. 463, 468. This Court pointed out in *Garner* that a government employee can be required upon pain of dismissal to respond to inquiry probing into matters relevant to his employment, and that present membership in the Communist Party is such a matter. See also *Beilan v. Board of Public Education, supra*. Certainly it is not a controlling constitutional distinction that New York, rather than impose on employees, as in *Garner* and *Beilan*, an absolute duty to respond to permissible inquiry upon threat of dismissal for refusal, has in these proceedings held that an employee lacking in candor to his governmental employer evidences doubt as to his trust and reliability. Finally, unlike the situation involved in *Konigsberg v. State Bar of California, supra*, there is here no problem of inadequate notice as to the consequences of refusal to answer, for appellant was specifically notified that continued refusal might lead to his dismissal."

In *Beilan v. Board of Public Education*, 357 U.S. 399, 2 L. ed. 2d 1414, petitioner, a public school teacher, was discharged by the local school board for "incompetency" under the Pennsylvania School Code because of his refusal, continued after warning that failure to answer might lead to dismissal, to answer a question of his superintendent as to his membership in a Communist political association. On an administrative appeal, the superintendent sustained the local board, but the county court set aside the discharge. On the appeal by the board the Pennsylvania Supreme Court reversed and reinstated the discharge. On *certiorari*, the United States Supreme Court affirmed. It held that due process was not violated by petitioner's discharge on the ground of "incompetency" evidenced by petitioner's refusal

to answer the request of the superintendent for information as to the teacher's loyalty and as to his activities in certain subversive organizations, such refusal being based upon the fifth amendment and other constitutional objections.

Justice Burton, who had voted with the majority in the [fol. 558] *Konigsberg case*, said at pages 404-6, 408-9: "The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory 'incompetency' based on his refusal to answer the Superintendent's questions.

"By engaging in teaching in the public schools, petitioner did not give his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher.

* * * * * * *

"The question asked of petitioner by his Superintendent was relevant to the issue of petitioner's fitness and suitability to serve as a teacher. * * * He made it clear that he would not answer any question of the same type as the one asked. Petitioner blocked from the beginning any inquiry into his Communist activities, however relevant to his present loyalty. The Board based its dismissal upon petitioner's refusal to answer any inquiry about his relevant activities—not upon those activities themselves. It took care to charge petitioner with incompetency, and not with disloyalty. It found him insubordinate and lacking in frankness and candor—it made no finding as to his loyalty.

* * * * * * *

"In the instant case, the Pennsylvania Supreme Court has held that 'incompetency' includes petitioner's 'deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness.' 386 Pa. at 91, 125 A.2d at 331. This interpretation is not inconsistent with the Federal Constitution.

* * * * * * *

"Our recent decisions in *Slochower* v. *Board of Higher Education*, 350 U.S. 551, and *Konigsberg* v. *State Bar of California*, 353 U.S. 252, are distinguishable. * * *

"In the *Konigsberg case, supra,* at 250-261, this Court stressed the fact that the action of the State was not based on the mere refusal to answer relevant questions—rather, it was based on inferences impermissibly drawn from the refusal. In the instant case, no inferences at all were drawn from petitioner's refusal to answer. The Pennsylvania Supreme Court merely equated refusal to answer the employing Board's relevant questions with statutory 'incompetency.'"

[fol. 559] In the instant case, as in *Lerner* and *Beilan*, and unlike the situation in *Konigsberg*, no problem exists as to inadequate notice of the consequences of a refusal to answer; the applicant was specifically notified both by the Illinois Supreme Court in its opinion in 3 Ill.2d 471, and by the committee on rehearing that his continued refusal to answer might lead to the denial of his application.

In *Barenblatt* v. *United States*, 3 L. ed. 2d 1115, 79 S. Ct. 1081 (1959), the petitioner was convicted of contempt by the district court for refusal to answer certain questions before a subcommittee of the Committee on Un-American Activities of the House of Representatives. Two of the questions were "Are you now a member of the Communist Party?" and "Have you ever been a member of the Communist Party?" The Court of Appeals affirmed but the Supreme Court vacated the judgment and remanded the case to the Court of Appeals for reconsideration in light of *Watkins* v. *United States*, 354 U.S. 178 (1957), 1 L. ed. 2d 1273. The Court of Appeals reaffirmed the conviction and the Supreme Court affirmed. Justice Harlan said at pages 1129-1131 (L. ed.):

"That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court, and it is sufficient to say, without particularization, that Congress has enacted or considered in this field a wide range of legislative measures, not a few of which have stemmed from recommendations of the very Committee whose actions have been drawn in question here. In the last analysis this power rests on the right of self-preservation, 'the ultimate value of any society,' Dennis v.

United States, 341 U.S. 494, 95 L. ed. 1137. Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress.

"On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld fed- [fol. 560] eral legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. See, e.g., Carlson v. Landon, 342 U.S. 523, 96 L. ed. 547, 72 S. Ct. 525; Galvan v. Press, 347 U.S. 522, 98 L. ed. 911, 74 S. Ct. 737. On the same premises this Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. See Gerende v. Board of Supervisors of Elections, 341 U.S. 56, 95 L. ed. 745, 71 S. Ct. 565; Garner v. Board of Public Works, 341 U.S. 716, 95 L. ed. 1317, 71 S. Ct. 909. See also Beilan v. Board of Public Education, 357 U.S. 399, 2 L. ed. 2d 1414, 78 S. Ct. 1317; Lerner v. Casey, 357 U.S. 468, 2 L. ed. 2d 1423, 78 S. Ct. 1311; Adler v. Board of Education, 342 U.S. 485, 96 L. ed. 517, 72 S. Ct. 380. Similarly, in other areas, this Court has recognized the close nexus between the Communist Party and violent overthrow of government. See Dennis v. United States, supra; American Communication Ass'n, C.I.O. v. Douds, supra. To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II, affairs to which Judge Learned Hand gave vivid expression in his opinion in United States v.

Dennis, 2 Cir.) 183 F.2d 201, 213, and to the vast burdens which these conditions have entailed for the entire Nation.

* * * * * * *

"* * * An investigation of advocacy of or preparation for overthrow certainly embraces the right to identify a witness as a member of the Communist Party, see Barsky v. United States, 83 App. D.C. 127, 167 F.2d 241, and to inquire into the various manifestations of the Party's tenets. The strict requirements of a prosecution under the Smith Act, see Dennis v. United States, supra, and Yates v. United States, 354 U.S. 298, 1 L. ed.2d 1356, 77 S. Ct. 1064, are not the measure of the permissible scope of a congressional investigation into 'overthrow,' for of necessity the investigatory process must proceed step by step."

[fol. 561] In *Uphaus* v. *Wyman*, 3 L. ed. 2d 1090, 79 S. Ct. 1040 (1959), the appellant, the executive director of World Fellowship, Inc., was adjudged in contempt by a New Hampshire county court for refusal to produce in connection with a State subversive inquiry a list of the guests attending the organization's summer camp. The New Hampshire Supreme Court affirmed the judgment and the Supreme Court of the United States also affirmed. Justice Clark said at pages 1096-1098 (L. ed.): "The interest of the guests at World Fellowship in their associational privacy having been asserted, we have for decision the federal question of whether the public interests overbalance these conflicting private ones. Whether there was 'justification' for the production order turns on the 'substantiality' of New Hampshire's interest in obtaining the identity of the guests when weighed against the individual interests which the appellant asserts. National Association for Advancement of Colored People v. State of Alabama, 357 U.S. 449 (1958). * * * The Attorney General sought to learn if subversive persons were in the State because of the legislative determination that such persons, statutorily defined with a view toward the Communist Party, posed a serious threat to the security of the State. The investigation was, therefore, undertaken in the interest of self-preservation, 'the ultimate value of any society,' Dennis v. United States, (1951), 341 U.S. 494, 509, 95 L. ed. 1137, 71 S. Ct. 857. This governmental interest outweighs in-

dividual rights in an associational privacy which, however real in other circumstances, cf. National Association for Advancement of Colored People v. State of Alabama, supra, were here tenuous at best."

In our earlier opinion, (3 Ill.2d 471,) we said at page 482: "Further, in regard to the contention that petitioner's right of free speech has been infringed upon by the inquiries of the committee, we may also consider the established principle of this jurisdiction that the practice of law is a privilege, not a right. In granting that privilege we may impose any reasonable conditions within our control and if an applicant does not choose to abide by such conditions he is free to retain his beliefs and go elsewhere. Among other things, the granting of the privilege to practice law in this State is conditioned upon proof by the applicant of his good moral character, of his general fitness to practice law and of his good citizenship, and upon the taking of an oath to support the State and Federal con- [fol. 562] stitutions. Such conditions are almost universal in this land and, so far as we can ascertain, their reasonableness has never been attacked. When an applicant knowing of such conditions, applies for admission and signifies that he will take the oath of lawyer, we think it inconsistent with the privilege he seeks that he should be permitted to defeat pertinent inquiry into his ability to fulfill such conditions by any claim of the right of free speech."

In the case of *In re Isserman*, 345 U.S. 286 (1953), 97 L. ed. 1013, the respondent was one of the attorneys for the defendants whose convictions were affirmed in *Dennis* v. *United States*, 341 U.S. 494 (1951). At the conclusion of the trial he was convicted for contempt of court, which was affirmed in *Sacher* v. *United States*, 343 U.S. 1 (1952). The Supreme Court of New Jersey disbarred the respondent, and the Supreme Court of the United States then issued a rule for the respondent to show good cause why he should not be disbarred in that court. In disbarring the respondent, the Supreme Court (Chief Justice Vinson) said at page 289: "Our rule puts the burden upon respondent to show good cause why he should not be disbarred. * * * There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself,

and hence society, as an instrument of justice. That to the individual disbarred there is a loss of status is incidental to the purpose of the Court and cannot deter the Court from its duty to strike from its rolls one who has engaged in conduct inconsistent with the standard expected of officers of the Court."

The Committee on Character and Fitness drew no inference of disloyalty or subversion from Anastaplo's consistent refusals to answer questions concerning Communist or other subversive affiliations. We agree with the committee that a strong public interest supports the interrogation of applicants for admission to the bar on their adherence to our basic institutions and form of government and that this public interest in the character of its attorneys overrides an applicant's purely personal interest in keeping such views to himself. In the light of *Barenblatt* v. *United States*, 3 L. ed. 2d 1115, 79 S. Ct. 1081, alone, the relevancy of an inquiry as to whether an applicant for admission to the bar is a member of the Communist Party is no longer debatable. Decisions of the United States Supreme Court since *In re Anastaplo*, 3 Ill.2d 471, fortify our earlier conclusion that a determination as to whether an [fol. 563] applicant can in good conscience take the attorney's oath to support and defend the constitutions of the United States and the State of Illinois is impossible where he refuses to state whether he is a member of a group dedicated to the overthrow of the government of the United States by force and violence. By failing to respond to the higher public interest, Anastaplo obstructed the proper functions of the Committee on Character and Fitness. By virtue of his own recalcitrance he failed to demonstrate the good moral character and general fitness to practice law necessary for admission to the bar of this State.

The report of the Committee on Character and Fitness is confirmed.

Report confirmed.

Mr. JUSTICE BRISTOW, dissenting:

I must dissent from the majority opinion on the ground that it deprives the applicant of due process of law under the Federal constitution by denying him admission to the bar in the absence of a scintilla of derogatory evidence to mar the substantial record of his good moral character, and is in direct conflict with the decisions of the United States Supreme Court in *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 1 L. ed. 2d 810, and *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 1 L. ed. 2d 796.

The constitutional issue in this cause is not, as the *per curiam* opinion implies, whether the committee's questions on political or subversive affiliation were constitutional. The issue is rather, even if Anastaplo were wrong about the impropriety of such questions, whether his good-faith refusal to answer them, on the ground that the first and fourteenth amendments of the Federal constitution barred such inquiry, is a sufficient basis for denying him admission to the bar for failure to establish good moral character. That issue has been determined by the United States Supreme Court in the *Konigsberg case*, which the majority opinion refuses to follow.

Before considering that case or the authorities cited in the majority opinion, I must point out that while I am no less sensitive to the very real danger of Communist infiltration in the bar than is the *per curiam* opinion, I do not believe, as the majority opinion does, that an indictment of the Communist Party, however justified, or a reiteration of the lawyer's obligation to his country, or a warning that the nation must have power to protect itself, however ap- [fol. 564] propriate, is any substitute for evidence against George Anastaplo's moral character. Moreover, I am constrained to call attention to the distorted picture of applicant, which the *per curiam* opinion endeavors to create.

The opinion at the outset tries to create the taint that applicant believes in a subversive political philosophy by quoting isolated statements out of context from the 1951 record—which is not even before this court—and by completely omitting applicant's statements respecting the right to revolution in the present record. The opinion omits

applicant's statement that his views on the right to revolution are, and have been, the same as those embodied in the Declaration of Independence and advanced by Lincoln and Daniel Webster in writings set forth in the present record. Nor does the opinion refer to applicant's unequivocal statement in the record: "But as I said when I first appeared before the full committee on January 5, 1951, I do not think anyone would be justified at a time such as this, when the normal processes of government permit reasonable and peaceful change, to participate in action leading to the overthrow of the government. The Committee must realize that I would be no less reluctant than they to see the right of revolution exercised, except in most extreme circumstances. I trust that my position and what I have contributed to its defense indicates an abiding commitment to constitutional government." Instead, the opinion dismisses such testimony summarily with the statement that applicant's views do not now require narration because the committee did not find them objectionable, after leaving the taint from the isolated statements in the prior record.

The *per curiam* opinion clutches at straws by even referring to Anastaplo's views on resistance to a court decree as grounds for denying him admission to the bar, in view of his unequivocal statement that he would resist a court decree only under circumstances where constitutional government has been subverted, so that resistance would really be aimed at restoring the constitution and supporting it without reservation. Surely this is no war against the constitution, as the *per curiam* opinion implies. Even the minority report of the committee frankly regarded this matter of resistance to a court decree as a far fetched ground for excluding applicant, particularly in view of his own exemplary conduct during the course of his bar admission litigation these past 9 years, which is the best evidence of his reaction to court orders.

[fol. 705] I could not, within the confines of this dissenting opinion, summarize the hours of questions, answers and arguments revealing all of applicant's views. I have already alluded to some of them. However, since the majority opinion has sought to give a distorted picture of those views and of the nature of the proceedings, I wish to call atten-

tion to some of the questions and answers which cast light on this matter.

At the very first session, applicant was asked whether he was a member of any nationality organization. After he replied that he was not, he was asked whether he was a member of a nationality organization that had been designated by the Attorney General as subversive. Applicant refused to answer, explaining that when the question designated the organization as subversive, its intent was to elicit information about political affiliations. To such inquiry he must object on the ground that it infringed his rights under the first and fourteenth amendments, was beyond the province of a Character and Fitness Committee, and, more particularly, was outside of the terms of the Supreme Court rehearing order of 1957. He pointed out that if the committee was interested in eliciting information, it already had the answer to this question, since he had just stated that he was not a member of *any* nationality organization.

In response to the query, "Are you refusing for fear that if you did answer one way or another we might be able to check and find that you have committed perjury," applicant stated, "That is not my fear." He added, "With reference to perjury, it is irrelevant to this situation as is any reference to the Fifth Amendment."

He explained that he would refuse to answer on constitutional principles all questions relating to political affiliations, including those with the Democratic and Republican parties, as well as with any and all organizations on the Attorney General's list, including the Communist Party, the K.K.K., or the Silver Shirts of America, even if the answers reflected favorably on him. He stated: "I would rather be rejected by this Committee if this question becomes crucial by taking a firm position on constitutional principles, than be accepted by seeming to take it, and at the same time taking a back door." Applicant added the observation that the committee, in pursuing this line of inquiry, was asking questions the answers to which it had very little doubt [fol. 566] about. Applicant also reiterated that the committee had nothing in the record originally, or during the course of the intervening 7 or 8 years, to justify this line of inquiry or to indicate that he would not take his oath

seriously and in good faith. In this connection, a spokesman for the committee admitted: "No one has stated to this committee that you are or have ever been a Communist, or a member of the Ku Klux Klan, or a member of the organizations listed as subversive on the Attorney General's list."

Consequently, applicant moved that the committee desist from this line of inquiry, which was beyond the Supreme Court mandate, was neither relevant, nor for the alleged purpose of inquiring into areas it might otherwise be uncertain about, was being pursued only to induce him to assert his constitutional objections, and was thereby highly prejudicial. The committee denied his motion.

In response to the admonition by the committee that his refusal to answer the question whether he was a member of the Communist Party "may have serious consequences," Anastaplo replied, "Am I ineligible because I take the dissents of certain members of the Supreme Court seriously?" He then pointed out that in the *Konigsberg* and *Schware* cases (353 U.S. 252; 353 U.S. 232) even the majority of the court supported his interpretation of the law, whereby refusal to answer the questions on the grounds asserted by him would, at most, constitute merely one piece of evidence in the record. He argued that such refusal would not necessarily be adverse nor warrant rejection. His position is best stated in his letter to the committee on March 27, 1958, which is included in the record:

> "Is one not obliged in the interest of good advocacy and judicial integrity to resist strenuously, even at the risk of incurring official displeasure, unconstitutional disregard of the rule of law? May not, in fact, such resistance reflect the best traditions of the bar, and thereby provide the best evidence that a character committee can desire with respect to applicant's qualification for the practice of law?"

This precise point, that refusal to answer may be indicative of good character, is evident in this record. Applicant courageously and properly refused to answer the unconstitutional religious inquiries—*i.e.*, whether he believed in

a Deity, or eternal punishment as a sanction for his oath. He stated that he would respect his duties as an attorney, with or without the oath, but did not care to speak about [fol. 567] whether there were any religious sanctions, such as the fear of eternal punishment, back of his oath, or whether he believed in a Deity, on the grounds that the constitution barred such inquiries. This line of inquiry, persisted in since the very first session, and apparently based upon an 1851 decision, was later admitted by the committee to be improper and unconstitutional since 1870.

The *per curiam* opinion completely overlooked this portion of the record. I cannot follow that course, particularly since the record shows that applicant's refusal to answer these religious questions had so prejudiced the committee that one member stated that the refusal to answer had a "substantial bearing on his [applicant's] fitness to practice law." Such prejudice could hardly be wiped out by the statement of the chairman that these improper questions would not be taken into consideration.

The majority opinion also ignored applicant's argument in support of his refusal to answer the political affiliations questions, that the avowed Communist of the type the committee would want to ferret out of the profession as a menace to our government would have little difficulty in compromising constitutional principles and in giving the desired answers, and that the approach of the committee was effective only in discouraging applicants to stand by principles. I find merit in this argument.

The majority opinion makes no reference to applicant's closing arguments, which I find indicative of his views on our form of government, and the obligation of the lawyer to that government. Here, the applicant first reviewed this cause from its inception, pointing out that the original committee action in 1951 reflected the tenor of the times, when groups tried to outdo each other in hunting possible subversives, and explaining that the Illinois Supreme Court was misled into sustaining the committee's action by the suppression and distortion of the sequence of evidence. He reiterated the lack of foundation for the affiliation inquiries, the legal arguments supporting his position, with particular emphasis on the *Konigsberg* record and decision. Finally,

he emphasized the basic tenets of our republican government and the obligations of the bar to preserve them, and to lead the nation by precept and example.

In addition to these significant omissions in the *per curiam* opinion, which give a completely misleading impression of the applicant and the hearings, I must also take issue with the scant attention paid by the *per curiam* [fol. 568] opinion to the character affidavits and letters of reference submitted to the committee. In my opinion the court should have given considerable weight to these affidavits, as did the United States Supreme Court in the *Schware* and *Konigsberg cases* (353 U.S. 232, 244, 1 L. ed. 2d 810; 353 U.S. 252, 265, 1 L. ed. 2d 796), particularly since they were submitted at the committee's request, on their forms, and were presented by persons of stature in the legal profession and other fields, who do not bandy about tributes such as were paid to applicant's honesty, integrity, general conduct and character traits qualifying him for the practice of law.

The affiants included Professor Alexander Meiklejohn, Professor Emeritus of the University of Wisconsin and past president of Amherst College, in whose name the American Association of University Professors established an Annual Award; Professor Malcolm Sharp, professor of law at the University of Chicago; Professor Roscoe Steffen, professor of law at Yale University and the University of Chicago, and advocate for the Department of Justice before the United States Supreme Court; Professor Yves Simon, formerly of Notre Dame and currently professor of philosophy at the University of Chicago, and recipient of the Spellman-Acquinas Medal for excellence in philosophy from the American Catholic Philosophical Association; Richard Weaver of the University of Chicago faculty and editorial writer for Modern Age, a conservative review. Other affiants include a former chairman of the Character and Fitness Committee; a lawyer who authored a text on the canons of ethics, and contributed substantially to bar association work; a minister, the Dean of the University College, and others who supervised Anastaplo's work. These affiants praised applicant's character unstintingly.

We note some of the comments, which are representative of the tenor of the affidavits.

Professor Meiklejohn attested: "He [Anastaplo] is intellectually able, a hard, thorough student and moved by high devotion to the principles of freedom and justice * * * unqualifiedly worthy of the highest trust and confidence."

Professor Sharp attested: "His [Anastaplo's] reputation in these respects [for honesty, integrity and general conduct] is of the highest. No question has ever been raised about his honesty or his integrity, and his general conduct, [fol. 569] characterized by friendliness, quiet independence, industry and courage, is reflected in his reputation * * *. His fellow students respect him. He is in every way among the very best of the students I have seen in my teaching experience."

Richard Weaver attested to applicant's unusual intelligence, fairness and personal modesty, and patriotism in the old-fashioned sense, as well as his sympathetic understanding of affiant's conservatism. "Everything I know about applicant leaves me feeling that he is an unusually intelligent, balanced and helpful American citizen."

Professor Yves Simon characterized Anastaplo by "intelligence, conscientiousness, sincerity and integrity," and concluded, "I consider Anastaplo to be a young man of the most distinguished and lofty moral character."

Dean Donohue of the University College, where Anastaplo taught, refers to his honesty as "admirable and unequivocal," and to his integrity as "perhaps even over rigid for our culture."

Robert Coughlin, Anastaplo's supervisor at the Industrial Relations Center, attested: "I would recommend him without the slightest reservation for any position involving the highest and most sacred trust. If admitted to the American Bar, he could do nothing that would not reflect glory on that institution."

Attorney William Trumbull attested: "Affiant has found applicant to exhibit in all respects an exceptionally high degree of honor and integrity and profound loyalty to his country, its form of government and its ideals and to enjoy an excellent reputation for good moral character."

In addition to this evidence, I believe that a review of the career of George Anastaplo will also cast light upon his character and fitness.

This record shows that George Anastaplo was born in 1925, in St. Louis, Missouri, where he secured his elementary school education; that the family moved to Carterville, Illinois, where he attended high school; and that he attended the University of Illinois for some three months before enlisting in the Air Corps, where he attained the rank of Second Lieutenant, and served some 38 months in the Pacific, European and North African theatres of war. He came out of service in February, 1947, and was attached to the Inactive Reserves until his resignation some few years ago. He was accepted by the University of Chicago for the Fall Term of 1947, and during 6 of the intervening [fol. 570] months he attended Southern Illinois University. He secured an A.B. degree from the University of Chicago one year later, after carrying a double schedule of classes, and then attended law school. He passed the bar examination in the fall of 1950, and was graduated from law school in 1951.

After this court denied his application for admission to the bar, he, his wife, whom he married in 1949, and their child had a brief trip to Paris, where he enrolled at the Sorbonne. From there they went to Dallas, Texas, where his wife's family resided. During their sojourn there, Anastaplo took a course in oil-and-gas law. At the end of 1951 the family returned to Chicago, and Anastaplo began working at the Industrial Relations Center on the preparation of materials for a training course for management personnel. He remained at that job until August of 1957, and also taught an adult education course at the University College of the University of Chicago. More recently he has been devoting half time to teaching at the College, and half time to an administrative post there, and is working toward his Doctor of Philosophy degree on a phase of constitutional law.

Other activities since the original character hearing in 1951 include a 6-week management study of the Socony Mobil Oil Company, in New York in the summer of 1956, pursuant to a business fellowship from the Foundation for

Economic Education; and serving as an election judge at the behest of both of the major political parties, in different elections. In this connection, it may be noted that the critical question of some committee members respecting this activity, when Anastaplo refused to identify his party affiliations on constitutional grounds, prompted him to inquire of the county judge whether he had unwittingly breached any rules by serving the Republican and Democratic parties at different elections, and whether something more than *pro forma* identification with a political party might be necessary to serve as an election judge. He also offered to return any payment received for his services. There was, however, no breach of any rules, nor any repayment of earnings necessary.

In the light of all the foregoing evidence appearing in the current record of over 400 pages, compiled pursuant to a searching examination of applicant by the committee during some six sessions of several hours each and extended from February to May of 1958, it is not clear to me just [fol. 571] how the majority of the committee or the *per curiam* opinion could conclude that applicant's refusal to reply to the questions on political affiliations prevented the committee from determining his character and fitness. I find apposite the statement in the minority report of the committee: "* * * On this record, it is pure sophistry to hold that his refusals to answer have prevented our determining his character."

Although the majority report denied applicant admission to the bar essentially because they claimed his failure to reply to questions on membership in the Communist Party or other subversive groups prevented inquiry into subjects which bear on the issue of character, it is significant that the majority made favorable findings on all matters designed for inquiry in our rehearing order. They found that applicant's views on the right to revolution were not objectionable; nor was there anything objectionable in his activities since the original petition was denied, or with respect to his present reputation. The report stated:

"Since applicant's original application was denied, he has engaged principally in the academic life as an instructor and research assistant at the University of Chicago. * * *

From the character affidavits and reference letters which have been submitted to us, it would appear that the applicant is well regarded by his academic associates, by professors who have taught him in school and by members of the Bar who know him personally. We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group."

Under these circumstances, I find more cogent the rationale of the minority report that since there were no adverse findings on the questions specified for rehearing, and no derogatory information, applicant should not have been denied admission to the bar. I find entirely reasonable the minority's argument that applicant's refusal to answer certain questions was merely one factor which must be weighed along with the reasons for such refusal, and with other evidence; and that refusal to answer questions on grounds of devotion to constitutional principle does not [fol. 572] "reflect adversely on character" and is a strange basis for denying admission to the bar.

With reference to the legal questions, I cannot agree with the statement in the *per curiam* opinion that the relevancy and constitutionality of the political-affiliations questions of bar applicants is no longer debatable. That issue has certainly not been determined in any bar admission case. It was expressly left undetermined in the *Konigsberg case*. In fact the court there recognized, as Anastaplo has consistently argued, that there was authority for regarding such questions as unconstitutional. The court stated at p. 270: "Prior decisions by this Court indicate that his [Konigsberg's] claim that the questions were improper was not frivolous, (*West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 87 L. ed. 1628,) and we find nothing in the record which indicates that his position was not taken in good faith."

The *Barnette case*, cited by the court, contained the following celebrated passage at p. 642: "If there is any fixed

star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, *or force citizens to confess by word or action their faith therein.*" [Ital. supplied.]

While this passage, which has not been overruled, lends support to applicant's position that a Character and Fitness Committee, acting for the State Supreme Court would have no right in insist that an applicant reveal his faith in any political credo, that case itself is not decisive. Nor can I agree with the *per curiam* opinion that the recent *Barenblatt case* (*Barenblatt* v. *United States*, — U.S. —, 3 L. ed. 2d 1115, 79 S. Ct. 1081 (1959) is determinative of that issue, or is in any way factually analogous.

The *Barenblatt case* involved a contempt proceeding in which the petitioner refused to answer questions of the House Un-American Activities Committee relating to his affiliations with the Communist Party on the ground that they were barred by the first amendment. The majority opinion, to which four justices dissented, first explained that where first amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the private and public interests at stake in the particular circumstances. After reaffirming the principle of the *Sweezy case* (*Sweezy* v. *New Hampshire*, 354 U.S. 234, 265, 1 L. ed. 2d 1311,) that "the subordinating interest of the State must be compelling," in order to overcome the individual rights, the [fol. 573] Supreme Court held that the balance must be struck in favor of the governmental interests, since the pertinency of the questions was not open to doubt, and the government's right of self-preservation justified extending its investigatory power in the domain of communist infiltration in education.

Even the broadest interpretation of the *Barenblatt case*, however, would not sanction the type of inquiry made by the committee herein. The court based its decision, in a great measure, on the fact that the inquiry in that case was identified at the outset as an investigation of Communist infiltration in education, and that the individual examined

had just previously been identified as a member of an alleged Communist group, and was being asked about that membership.

Such circumstances are a far cry from the situation in the case at bar. It is one thing to sustain the constitutionality of subversive affiliations questions when they are propounded to one identified as a Communist, and submitted by an Un-American Activities Committee of the United States Congress, charged with discovering communist infiltration. It is quite another thing, however, to sanction such questions when asked of one against whom there is not scintilla of evidence of subversive affiliations, and when the questions are submitted by a bar admission committee, charged only with ascertaining applicant's moral character, and in no way authorized by statute or rule of court to investigate or reject members of any political persuasion from the profession.

In my judgment, furthermore, the fact that the court in the *Barenblatt case* so closely circumscribed its decision, limiting it to the precise circumstances before it, stressing the pertinancy of the questions, and calling attention to cases where the individual inferests were held paramount, does not indicate a disposition to sustain the constitutionality of such questions in all types of cases.

However, this issue is not decisive in the Anastaplo case. As hereinbefore noted, the fundamental issue is not the constitutionality of the political-affiliations questions, but rather whether applicant's refusal to answer them could be deemed grounds for denial of admission to the bar for failure to establish good moral character. Therefore, I do not deem it necessary to try to resolve the constitutionality of the questions by analogy to the host of other related cases. (*N.A.A.C.P.* v. *Alabama*, 357 U.S. 448, 2 L. ed 2d [fol. 574] 1488; *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 94 L. ed. 925; *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 100 L. ed. 692; *Kent* v. *Dulles*, 357 U.S. 116, 2 L. ed. 2d 1204; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 1 L. ed. 2d 1311.) Even if this court were to conclude that the subversive affiliations questions under the circumstances did not offend the first and fourteenth

amendments of the Federal constitution, and that George Anastasplo had no constitutional right to refuse to answer the committee's question, his refusal would constitute merely one item of evidence, and we would still be obliged, under the decisions of the United States Supreme Court, to determine his moral character on the basis of the entire record. *Konigsberg* v. *State Bar of California*, 353 U.S. 252; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232.

In evaluating that record, furthermore, this court may not draw any unfavorable inferences of character from an applicant's refusal to answer questions based upon a good faith reliance on constitutional principles. *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 1 L. ed. 2d 810.

Inasmuch as I am firmly convinced that the law set forth by the United States Supreme Court in the *Konigsberg case* is determinative of the issue in the instant case, I am obliged to closely examine that decision and the ineffective ways in which the *per curiam* opinion has endeavored to whittle it away and to avoid it as a precedent.

In the *Konigsberg case* a bar applicant who had been identified as a Communist, and had been highly critical of government policies in his writings, was interrogated about his political affiliations and beliefs by the Bar Admission Committee in order to discover whether he was, or had ever been a member of the Communist Party. As in the instant case, the applicant refused to respond to such questions on the ground that they were an intrusion into areas protected by the Federal constitution. He also objected on the ground that California law did not require him to divulge his political associations or opinions in order to qualify for the bar, and that the questions above these matters were not relevant. The Committee denied his application for admission, essentially on the ground that he failed to demonstrate that he was a person of good moral character. The action of the Committee was affirmed by the State court, but was reversed by the United States Supreme Court.

That decision emphasized (1) that bar admission can- [fol. 575] not be denied for failure to establish good moral character, unless it appears from an examination of the

entire record that a reasonable man could fairly find that there were doubts about applicant's honesty, fairness and respect for the rights of others, and for the laws of the State and the nation; (2) that much significance should be attached to the affidavits relating to applicant's character, and the absence of derogatory testimony; and (3) that in a bar admission case no unfavorable inferences on moral character may be drawn from refusal to answer questions on constitutional grounds.

The *per curiam* opinion, of course, makes no reference to the court's statement at p. 270 disposing of the precise issue involved herein: "Obviously the State could not draw unfavorable inferences as to his [applicant's] truthfulness, candor or his moral character in general if his refusal to answer [the political affiliations questions] was based upon a belief that the United States Constitution prohibited the type of inquiries which the Committee was making." Nor does the *per curiam* opinion take cognizance of the decisive statement of the court at p. 273: "Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law."

What "authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him" did the committee have against George Anastaplo? His refusal to answer questions on grounds that they were improper under the first and fourteenth amendments of the constitution? That conduct, according to the United States Supreme Court, may not be deemed adverse character evidence. The record is absolutely devoid of any conceivable derogatory evidence. If the United States Supreme Court had difficulty comprehending why Konigsberg was rejected even though there was some evidence of prior Communist membership and certain inflammatory writings, it would, *a fortiori*, have greater difficulty understanding why Anastaplo was denied admission to the bar where even the committee chairman admitted that there was no evidence whatever that the applicant was in any way ever connected with the Communist Party or with any subversive group.

The *per curiam* opinion endeavors to avoid the impact

of this *Konigsberg case* by suggesting that it was not a final determination, since the cause was remanded to the [fol. 576] State Court. This is specious reasoning. Obviously the case had to be remanded to the State court, for it is not the province of the United States Supreme Court to admit persons to membership to the bar of any State, but rather to determine whether the actions and standards imposed by the State in bar admission cases infringed constitutional rights. This the Supreme Court unequivocally did in the *Konigsberg case,* and any subsequent action by the California court in that case cannot modify, or in any way detract from the principles of law promulgated by the Supreme Court in the decision. Its determination that constitutional rights (the due-process guarantee) are infringed when a State denies an applicant admission to the bar for failure to establish good moral character, merely because he refuses on constitutional grounds to answer political or subversive affiliations questions, is binding upon this court and cannot be construed away.

The *per curiam* opinion further attempts to avoid the *Konigsberg* precedent by construing it holds only that there was inadequate notice to the applicant that refusal to answer would warrant rejection. The opinion then asserts that since such a warning was given in the instant case the *Konigsberg* decision is distinguishable. This attempt at refinement of the decision is contrary to the facts. The applicant in the *Konigsberg case* was given the same notice as Anastaplo was given. He was informed that refusal to answer would have a bearing on the committee's determination, and that some committee members did not agree that he had a constitutional right to refuse to answer. (Footnote p. 259.) Similarly, the committee herein warned Anastaplo at p. 37 of the record, that his "refusal to answer may be taken into account by the Committee in determining whether you have established your fitness to become a member of the bar." In neither case was the applicant advised that refusal to answer would *ipso facto* warrant a denial of admission, irrespective of any and all other evidence. On the contrary, the actions of the committee in the instant case in conducting 4 more lengthy hearings, in encouraging the applicant to submit his writings and any other evi-

dence, and in stating that it was "interested in your reasons for not answering," are inconsistent with any warning that refusal to answer would automatically preclude Anastaplo's admission to the bar.

Moreover, even if such a warning had been given, it would have been, according to the *Konigsberg case*, beyond [fol. 577] the power of the committee. The court in that case noted that the committee has no authority or power by statute, decision or rule of court to apply a "brand new exclusionary rule," or a "brand new sanction on analogy to the summary contempt cases," whereby refusal to answer a question would mean rejection. The court stated at p. 260-261: "There is nothing in the California statutes, the California decisions or even in the Rules of the Bar which has been called to our attention, that suggests that failure to answer a Bar Examiner's inquiry is ipso facto a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners." Nor is there any such authority in Illinois for applying any such "brand new exclusionary rule."

Equally untenable is the attempt to sidestep the *Konigsberg case* by bandying about words and arguing that this court is not drawing unfavorable character inferences from applicant's refusal to answer the political affiliations questions, but that such refusal prevented inquiry into subjects which bear upon his character and resulted in his failure to establish good character. As stated in the minority report, this reasoning is "pure sophistry." Any realistic appraisal of this record indicates that from the searching examination of applicant, from his letters and writings on the responsibilities of a citizen and lawyer to our government, from the writings of statesmen and scholars whose views he embraced, from the affidavits elicited by the committee, and from the committee's own independent investigation, it should have known well George Anastaplo, his moral character and his views respecting our constitutional government. Moreover, through its power of subpoena, the committee could have supplemented that fund of knowledge if necessary.

Therefore, in my judgment the determinative principles of the *Konigsberg case* cannot be avoided by any of the techniques of construction advanced in the *per curiam* opinion. Nor is the law of that case in any way modified or affected by the *Beilan* and *Lerner cases*, relied upon by the *per curiam* opinion. (*Beilan* v. *Board of Education*, 357 U.S. 399, 2 L. ed. 2d 1414; *Lerner* v. *Casey*, 357 U.S. 468, 2 L. ed. 2d 1423.) These cases both carefully distinguished the *Konigsberg case*. They involved public employees who were dismissed under the Pennsylvania School Code and the New York Security Risk Law, respectively, [fol. 578] for refusing, on fifth amendment grounds, to answer questions about membership in the Communist Party.

For those cases to be determinative of the Anastaplo case, we must equate "refusal to answer" with failure to establish good moral character. This means that the remainder of the evidence in the record, including all of the other questions and affidavits of good moral character is immaterial. Under this interpretation, the committee should have concluded the hearing after the first unanswered question on religious affiliations at p. 18 of the record, or shortly thereafter at p. 34, when the first political affiliations questions were unanswered, for nothing said thereafter would have any significance.

How can this interpretation be squared with the committee's statement at p. 37 of the record that it was interested in applicant's reasons for not answering, or with the 5 sessions it held, or with the 400-page record it encouraged? How can such a course be followed in the light of the determinations in the *Konigsberg case* at p. 264 that in bar admission cases moral character must be determined from the entire record, and that refusal to answer on constitutional grounds is an insufficient basis for a finding of failure to establish good moral character.

The construction advanced by the *per curiam* opinion, moreover, would be inconsistent with the purpose and function of a character and fitness committee. That body is not an Un-American Activities Committee charged with investigating Communists, with power to require—indirectly—non-communist oaths of pain of denial of admission to

the bar. Nor is it conducting a contempt proceeding with the denial of the right to practice law imposed as punishment for refusal to answer questions which the Committee regards as "proper." It is not inconceivable, furthermore, that refusal to answer might be more indicative of good character in some instances, than answering. We have only to recall the unconstitutional religious interrogation of applicant herein to appreciate that fact.

Furthermore, the *per curiam* opinion has apparently lost sight of the fact that the *Lerner* and *Beilan cases* did not involve bar admissions, but rather the duties of public employees to their employer—a category which has long been given special treatment in the law. (*Garner* v. *Board of Public Works,* 341 U.S. 716, 95 L. ed. 1317; *Adler* v. *Board of Education,* 242 U.S. 485, 96 L. ed. 517.) In fact, the *Lerner* and *Beilan cases* add very little to the law laid down [fol. 579] in the *Garner* and *Adler cases,* which were decided long prior to the *Konigsberg case,* which did not even refer to those cases or regard them as authoritative in bar admissions interrogations.

In relying upon the *Beilan* and *Lerner cases* the *per curiam* opinion has deliberately overlooked the striking differences in the operative facts of those cases and the case at bar. The *Beilan* and *Lerner cases* involved evidence of "suspect activities," and membership in the Communist Party, all of which is entirely lacking in the instant case. Moreover, refusal to answer the subversive affiliations questions in those cases was predicated upon the privilege against self-incrimination, whereas in the case at bar Anastaplo would refuse to answer even if the replies reflected favorably upon him. In fact, his refusal was not limited to questions about subversive groups, but extended to all political affiliations, including membership in the Republican and Democratic parties.

In my judgment these fundamental differences in the operative facts certainly affect the significance of the refusal to answer, and warrant treating such refusal differently in the *Lerner* and *Beilan cases* than in the case before us.

In reviewing the other authorities cited by the *per curiam* opinion, I note the conspicuous omission of any

discussion of the leading bar admission case of *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 1 L. ed. 2d 796. In that case the United States Supreme Court in a unanimous decision held that unless the committee's finding of failure to establish good moral character is substantiated by evidence, a denial of admission to the bar on that ground violates the due-process clauses of the Federal and State constitutions. The court held that irrespective of whether the practice of law is labelled a "right" or a "privilege" (which the *per curiam* opinion calls it), an applicant cannot be excluded from practice in a manner, or for reasons that contravene the due-process clause of the fourteenth amendment. At p. 239, the court emphasized that any qualifications imposed by the State must have a rational connection with the applicant's fitness or capacity to practice law. Not only must the State avoid arbitrary standards, but even in applying permissible standards, it cannot exclude an applicant when there is no basis for finding that he fails to meet these standards. After a review of the relevant principles of law in bar admission proceedings, the court [fol. 580] found that neither membership in the Communist Party during the years between 1932 and 1940, nor the use of aliases to secure jobs, nor arrests under the particular circumstances constituted adverse evidence of moral character. The court reasoned that even though the nature and purposes of the Communist Party of 1950, as viewed in the *Douds case* (*American Communications Ass'n, C.I.O.* v. *Douds*, 339 U.S. 382, 94 L. ed. 2d 925) may warrant classifying it differently from other political parties, that view did not constitute a "substitute for evidence" to show that the petitioner participated in any illegal activity or did anything morally reprehensible as a member of the party. The court quoted with approval the concept that "Mere unorthodoxy (in the field of political and social ideas) does not as a matter of fair and logical inference negative good moral character." It then stressed the importance of the character affidavits and the absence of derogatory testimony, and concluded that since there was no evidence to justify the bar examiner's finding that petitioner had not shown "good moral character," the action of the board, refusing to permit petitioner to take the bar

examination, deprived him of due process of law. If actual membership for 7 years in the Communist Party did not *per se* justify a finding of failure to establish good moral character in the opinion of the United States Supreme Court in the *Schware case*, then I fail to perceive how mere disagreement over constitutional interpretation can be deemed such morally reprehensible conduct as would support a finding of failure to establish good moral character, as the *per curiam* opinion has affirmed in the instant case.

Before concluding this dissenting opinion, I am constrained to note that it is hardly consistent with judicial objectivity for the *per curiam* opinion to have overlooked every item of positive evidence submitted in support of establishing applicant's good moral character. Guidance on the meaning of the phrase "good moral character" is found in Justice Frankfurter's concurring opinion in the *Schware case* where the learned Justice stated: "It is a fair characterization of the lawyer's responsibility in our society that he stand 'as a shield,' to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility that have, through the centuries, been compendiously [fol. 581] described as 'moral character.'"

Anyone reading this record, whether or not he agrees with George Anastaplo's interpretation of his constitutional rights, cannot come away without being impressed by his adherence to truth and what he regards as basic principles of good citizenship. His refusal to answer certain questions is not in fear of the truth, but rather in defense of what he believes to be the truth—that a citizen, particularly a lawyer, has a duty to defend constitutional principles, "even at the risk of incurring official displeasure." His restrained and well mannered testimony and conduct at the hearing corroborate fully the glowing evaluations of his character and reputation in the affidavits submitted to the committee.

On the basis of this entire record, it is my opinion that there was substantial evidence of George Anastaplo's good

moral character, which was in no way marred by a single item of evidence from which the committee could reasonably conclude that there were doubts about applicant's honesty, fairness and respect for the rights of others or for the laws of the nation. Under these circumstances, the committee's action denying applicant admission to the Illinois bar on the basis of its finding that he failed to establish good moral character, constituted a denial of due process of law under the decisions of the United States Supreme Court, and should properly have been rejected by this court.

SCHAEFER and DAVIS, JJ., also dissenting:

As a result of the exhaustive hearings before the Committee, we now have far more information as to the moral quality, the legal capacity and the political views of this applicant than is ordinarily the case.

The report of the Committee makes it clear that apart from the problems that stem from the applicant's insistence upon what he regards as his constitutional right to refuse to answer questions relating to his political views, there is no basis for denying him admission to the bar. The record suggests nothing derogatory as to his character or his reputation. The affirmative showing of good character and reputation is entirely convincing. So far as the right of revolution and the use of force to overthrow the government are concerned, the applicant was unable to visualize, in the foreseeable future, any circumstances that might call for its exercise in this country. We agree with the Committee that these views, illustrated as they were by the revolt of Hitler's generals toward the close of World War II [fol. 582] and the recent Hungarian revolt, were neither subversive nor foreign to American political philosophy.

But the applicant did refuse to answer questions as to membership in the Communist party or in subversive organizations. Those questions were not predicated upon any information that might have led the Committee to suspect such membership. Despite the fact that the application has been pending for many years, the Committee expressly states that it has "received no information from any outside source which would cast any doubt on applicant's loy-

alty or which would tend to connect him in any manner with any subversive group."

Our prior decision determined that questions concerning the applicant's membership in the Communist Party or in subversive organizations were relevant, and we must now determine the consequence to be attached to his refusal to answer them. It is possible to say that he has refused to answer relevant questions, that the burden of proof rests on him and that he must therefore be denied admission to the bar.

In our opinion, however, a more penetrating approach to the problem is necessary if we are to discharge our duty with fairness and justice. The applicant has refused to answer these questions because he believes that they violate his rights under the first and fourteenth amendments to the constitution of the United States. He has expressly disclaimed any reliance upon the privilege against self-incrimination. His views as to the constitutional propriety of the questions may be right or they may be wrong, but there seems to be no doubt as to their sincerity. Adherence to them has prevented his admission to the bar for many years. We do not see in this record any basis for a finding that the applicant's refusal to answer raises a doubt as to the sincerity with which he takes the oath to support the State and Federal constitutions.

We think that it is unnecessary and inappropriate to decide this matter as though it called for an exercise of the ultimate limits of State power with respect to admission to the legal profession. What is involved is no more than an appraisal of the applicant's moral character and his fitness to practice law. His views upon the right of revolution were fully expounded before the Committee. Those views are incompatible with membership in the Communist Party, or with anything resembling subversion. It is hard to understand the logic of a position that permits the [fol. 583] applicant to expound at length upon his views as to the right of revolution but prevents him from answering questions as to Communist party membership. But we can not say that what seems to us to be a logical inconsistency is a reflection upon his character.

It is true that the work of the Committee has been greatly increased by the applicant's refusal to answer directly.

But that refusal appears to have been sincerely based upon constitutional grounds that can not be said to be entirely implausible. To refuse admission, therefore, would amount only to an assertion of power beyond that which is required in order to determine the question before the court.

In our opinion the record sufficiently demonstrates that the applicant possesses the requisite qualifications for admission to the bar.

[fol. 584]

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

PRESENT: BYRON O. HOUSE, CHIEF JUSTICE

JUSTICE JOSEPH E. DAILY, JUSTICE WALTER V. SCHAEFER, JUSTICE GEORGE W. BRISTOW, JUSTICE HARRY B. HERSHEY, JUSTICE RAY I. KLINGBIEL, JUSTICE CHARLES H. DAVIS.

GRENVILLE BEARDSLEY, ATTORNEY GENERAL.

ROBERT G. MILEY, MARSHAL.

ATTEST: MRS. EARLE BENJAMIN SEARCY, CLERK.

Be It Remembered, that, to-wit: on the 19th day of November, A.D. 1959, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

In re:)
)
N. R. 780)
)
George Anastaplo)
)

JUDGMENT—November 19, 1959

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected the Report of the Committee on Character and Fitness herein, together with the briefs filed by respondent, and being now fully advised of and concerning the premises;

It Is Hereby Ordered that the Report of the Committee on Character and Fitness be confirmed.

[fol. 585] Petition for Rehearing covering 10 pages filed December 3, 1959, omitted from this print. It was denied, and nothing more by order, January 21, 1960.

[fol. 586]

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

In re:
N. R. 780
George Anastaplo

ORDER DENYING PETITION FOR REHEARING—
January 21, 1960

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

[fol. 587] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 588]

SUPREME COURT OF THE UNITED STATES

No. 801, October Term, 1959

IN RE GEORGE ANASTAPLO, Petitioner

ORDER ALLOWING CERTIORARI—May 2, 1960

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted, and the case is set for argument immediately preceding No. 661.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 18 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 801 58

IN RE GEORGE ANASTAPLO,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

GEORGE ANASTAPLO
6030 Ellis Avenue
Chicago 37, Illinois
DOrchester 3-4825
Counsel pro se

March 18, 1960

INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented for review	3
Constitutional provisions and statutes involved	6
Statement	
1. 1950-1955	6
2. 1957-1960	7
3. What is Wrong with George Anastaplo?	9
4. What is Right with George Anastaplo?	12
5. How the Federal Questions are Presented	14
Reasons for granting the writ	15
Conclusion	26
Appendix (bound separately)	
I. Orders of the Committee on Character and Fitness in 1957 (before a rehearing was ordered by the Supreme Court of Illinois)	1
Order of June 12, 1957 denying rehearing	1
Order of July 2, 1957 denying rehearing	1
Dissent of Commissioner Rothschild	2
Dissent of Commissioner Sawyier	6
II. Order of the Supreme Court of Illinois providing for a Rehearing, September 17, 1957 (set forth in 18 Ill. 2d, at 186)	7
III. Reports of the Committee on Character and Fitness, April 9, 1959 (reprinted in 19 Lawyers Guild Rev. 64)	8
Majority Report (against admission to the bar)	8
Minority Report (recommending admission)	28

PAGE

IV. Opinions of the Supreme Court of Illinois, November 19, 1959 and January 21, 1960, 18 Ill. 2d 182, 163 NE 2d 429 34
Per Curiam opinion (denying admission) 34
Dissenting opinion of Mr. Justice Bristow 53
Dissenting opinion of Mr. Justice Schaefer and Mr. Justice Davis 78

V. Letter of Committee Secretary, February 17, 1960, in response to Petitioner's letter of February 5, 1960 81

VI. Constitutional Provisions and Statutes Involved 82

TABLE OF AUTHORITIES CITED*

Constitutional Documents

Article I, Sec. 10, Const. 6

Amendment I, Const. 3, 6

Amendment XIV, Const. 3, 4, 5, 6

Declaration of Independence 4

Cases

Adler v. Board of Education, 342 U.S. 46 24

Anastaplo, In re, 3 Ill. 2d 471, 121 N.E. 2d 826, 348 U.S. 946, 349 U.S. 903, 908 ..... 16, 19

Beilan v. Board of Education, 357 U.S. 399 24

Barenblatt v. United States, 3 L. ed. 2d 1115 24

Cantwell v. Connecticut, 310 U.S. 296 16

* Various law review and other publications are referred to below in notes 1, 8, 16 and 20.

PAGE

Garner v. Los Angeles Board, 341 U.S. 716 24

Gitlow v. New York, 268 U.S. 652 16

Konigsberg v. State Bar, 353 U.S. 252 .....3, 4, 7, 15, 21, 24

Lerner v. Casey, 357 U.S. 468 24

McCullough v. Maryland, 4 Wheat. 316 25

Schware v. Board of Bar Examiners, 353 U.S. 232 ....3, 4, 7, 15, 21, 24

Summers, In re, 325 U.S. 561 3

West Virginia Board of Education v. Barnette, 319 U.S. 624 16

Statutes

Judiciary Code—28 U.S.C. Sec. 1257 2

Ill. Rev. Stat. 1951, chap. 13, par. 4 6

Ill. Rev. Stat. 1951, chap. 110, par. 259.58 (Ill. Supreme Court Rule 58) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO.

IN RE GEORGE ANASTAPLO,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Petitioner, George Anastaplo, respectfully prays for a Writ of Certiorari to the Supreme Court of Illinois to review the denial of his application for admission to the practice of law in the State of Illinois.

Opinions Below.

On June 12, 1957, the Committee on Character and Fitness of the First Appellate Court District of Illinois (sitting in Chicago) denied petitioner's request for rehearing of his application for admission to the Illinois bar, but not without granting him leave to file a supplementary petition for rehearing with answers to two in-

terrogatories posed by the committee. Upon receipt of petitioner's responses to these interrogatories, the committee promptly declined (on July 2, 1957) to grant petitioner a rehearing, Commissioners Rothschild and Sawyier dissenting.

Upon appeal, the Supreme Court of Illinois on September 17, 1957 ordered the committee to conduct a rehearing. The committee, almost a year after completing the rehearing ordered by its court, refused on April 9, 1959 to recommend petitioner for admission to the bar. The committee divided 11-6 and majority and minority reports were filed in the Supreme Court of Illinois.

Upon appeal again, the Supreme Court of Illinois affirmed on November 19, 1959 the decision of the committee majority, with Mr. Justice Bristow filing a dissenting opinion. On January 21, 1960, the court below denied a petition for rehearing, with two additional members (Mr. Justice Schaefer and Mr. Justice Davis) filing a dissenting opinion. (18 Ill. 2d 182, 163 N.E. 2d 429). An attempt on the part of petitioner to "settle out of court" without sacrifice of principle resulted in a fruitless exchange of letters with the committee in February, 1960.

The various opinions, orders, reports and letters that have been referred to here are set forth in the separate Appendix to this Petition (hereafter referred to as "App.").

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered November 19, 1959. Timely petition for rehearing was filed December 3, 1959 and denied January 21, 1960.

A writ of certiorari is petitioned for under 28 U.S.C. § 1257, a title, right, privilege or immunity having been

specially set up or claimed under the Constitution. This Court has recently granted certiorari in bar admission cases involving facts and issues similar to those found in this case. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Konigsberg* v. *State Bar*, 353 U.S. 252 (and again on March 7, 1960). See, also, *In re Summers*, 325 U.S. 561.

Questions Presented for Review.

1. Petitioner's views as to what are relevant, necessary or permissible inquiries of applicants for admission to the bar are shared neither by the Supreme Court of Illinois nor by its Committee on Character and Fitness. Nevertheless, petitioner cannot, in good conscience and with due regard for the common good, submit to such inquiries even should the making of these inquiries into his political affiliations or associations be deemed permissible for bar admission proceedings under the Constitution. He has referred to eminent Americans of unquestioned character and good citizenship who have supported positions similar to his. His refusal is presented as a form of protest against such inquiries and proceedings and against the test-oath-like nature of the situation with which he has been confronted.

Is such a protest or refusal, especially when petitioner has otherwise sustained the burden of proof as to his character, fitness and good citizenship and when the sincerity of his position is not challenged, protected by the First and Fourteenth Amendments as an exercise of the right to freedom of speech for which no penalty, such as exclusion from the bar, may be exacted by a State?

2. Do the decisions in this case by the court below and its committee, which deny petitioner admission to the bar despite his evident qualifications to practice law, conform to the standards with respect to due process of law and

to equal protection of the laws under the Fourteenth Amendment laid down for bar admission matters by this Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, and *Konigsberg* v. *State Bar*, 353 U.S. 252?

3. Has petitioner been deprived of liberty and property, in violation of the freedom of speech guarantees of the First and Fourteenth Amendments, by being excluded from the bar because of the expression of legitimate opinions about the right of revolution and the Declaration of Independence?

4. Has petitioner been deprived of liberty and property, in violation of the freedom of speech and freedom of religion guarantees of the First and Fourteenth Amendments, by being excluded from the bar because of his long-standing refusal to answer questions about his political affiliations and religious beliefs?

5. Has petitioner been deprived of liberty and property, in violation of the due process and equal protection clauses of the Fourteenth Amendment by being excluded from the bar because of his refusal to answer political affiliations inquiries, the foundation of which inquiries in and the relevance of which to this proceeding have not only never been established but have even been denied by the explicit admission on the part of the Illinois authorities that they have absolutely no evidence linking petitioner with any so-called "subversive" organizations?

6. May a conscientious refusal, on plausible constitutional grounds, to answer questions about political affiliations be treated as evidence adverse to an applicant for admission to the bar without infringing upon the due process guarantee of the Fourteenth Amendment?

7. Has petitioner been deprived of liberty and property, in violation of the due process and equal protection clauses of the Fourteenth Amendment, by being excluded from the bar because of the refusal of the Illinois authorities to give proper recognition to the record as a whole, a record which is overwhelmingly favorable to petitioner, in passing upon his character and fitness for admission to the bar?

8. Has petitioner been deprived of liberty and property, in violation of the due process and equal protection clauses of the Fourteenth Amendment and of the *ex post facto* clause of the Constitution, by the attempt of the Illinois authorities to devise a "brand new exclusionary rule" whereby his refusal to answer any question put by a member of the Committee on Character and Fitness constitutes grounds for exclusion from the bar, especially when the refusal to answer these questions came early in the proceedings and did not put an end to a lengthy examination of petitioner and when only a few of the many unanswered questions are now referred to by the committee as justifying exclusion?

9. Would not petitioner's exclusion from the bar, even if he were shown to be a member of the Communist Party or of the Ku Klux Klan, be unjustified on this record in the face of the guarantees of freedom of speech in the First Amendment and of due process of law and equal protection of the laws in the Fourteenth Amendment? If so, can he be properly denied admission to the bar when all he has done is to refuse on principle to answer questions about such memberships, especially after the admission by the Illinois authorities that there is absolutely no evidence linking him with any "subversive" organization?

10. Aside from the effect of other constitutional limitations upon state action, does this Court have the power

to examine, for their wisdom as well as their reasonableness, the methods and standards employed in the state courts which supply the bar of this Court and to correct state action which excludes an applicant qualified to practice both in his state and before this Court? If such power exists, should this Court exercise it in this instance to provide for the admission of petitioner to the Illinois bar or, at least, to the federal bar and the bar of this Court?

Constitutional Provisions and Statutes Involved.

The constitutional provisions involved are Section 10, Article I and the First and Fourteenth Amendments of the Constitution of the United States. The statutory provisions involved are Chap. 110, par. 259.58, IX and Chap. 13, par. 4, Illinois Revised Statutes 1951. The pertinent text of these provisions is set forth in the separate Appendix to this Petition.

Statement.

1. 1950-1955. Petitioner began the study of law in 1948 at the University of Chicago Law School, eighteen months after completion of his war-time service as an Air Force navigator officer. His 1950 application for admission to the Illinois bar was denied by the Chicago Committee on Character and Fitness in 1951, a denial affirmed by the Illinois Supreme Court in 1954. (3 Ill. 2d 471, 121 N.E. 2d 826).

Both the court and the committee stressed as justification for their action petitioner's views on the right of revolution as well as his refusal on principle to answer questions about possible membership in any political organization. This Court, with two members dissenting, re-

fused in 1955 to review the Illinois action. (348 U.S. 946, 349 U.S. 903, 908.[1])

2. 1957-1960. A renewed application for admission to the bar was filed with the committee in 1957, after this Court's decisions in the *Schware* and *Konigsberg* cases. The committee refused to consider this application after inquiring of and learning from petitioner that he still held his former views with respect to the right of revolution and that he must continue to refuse to answer any questions about his political affiliations and associations.[2]

Petitioner appealed this 1957 decision of the committee to the Supreme Court of Illinois. That court ordered the

---

[1] Petitioner's 1955 Jurisdictional Statement in the Supreme Court of the United States, pp. 9-17, presents a careful summary of the initial examinations of petitioner by the Committee on Character and Fitness in 1950-1951. A substantial part of the record made at that time and on which the 1954-1955 appeal was based is reproduced in London, "Heresy and the Illinois Bar: The Application of George Anastaplo for Admission," 12 Lawyers Guild Rev. 163 (1952).

Law review and other comments on the 1950-1955 phase of the case are found in The University of Chicago Maroon, May 9, 1952; Expose, March-April 1953; Brown and Fassett, 20 Univ. Chicago L. Rev. 480, 481-2, 501, 502 (1953); Sharp, 20 Univ. Chicago L. Rev. 529, 541 (1953); The Carterville (Ill.) Herald, October 1, 1954, p. 2; I. F. Stone's Weekly, March 7, 1955, p. 3; Note, 1955 Washington Univ. L. Q. 83; Note, 2 UCLA L. Rev. 224 (1955); Starrs, 18 Univ. Detroit L. J. 195, 216 (1955); Note, 50 Northwestern Univ. L. Rev. 94 (1955); Sharp, 16 Lawyers Guild Rev. 1, 2 (1956); The Marion (Ill.) Daily Republican-Leader, December 26, 1956; Sharp, 17 Lawyers Guild Rev. 43 (1957); Cramton, 8 Univ. Chicago Law School Record (Special Supplement), n235 (August 1958); Brown, Loyalty and Security, 111-112 (1958); Pritchett, The American Constitution, 465-466 (1959).

Petitioner was born in St. Louis, Missouri, November 7, 1925, grew up at Carterville, Illinois, and received most of his higher education at the University of Chicago after his United States Air Force service in the Pacific, Europe, North Africa and the Middle East. He is married and the father of three children. See, for additional biographical information, Note 16, below.

[2] App. 1; Petitioner's Supplementary Petition for Rehearing, June 25, 1957 (this document is part of the Record.)

committee to conduct a rehearing, specifying the questions on which evidence should be taken:[3]

> The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California*, 353 U.S. 252, and *Yates* v. *United States*, 1 L. ed. 2d 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.
>
> We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence *on these matters*, and the Committee is requested to do so, and to report the evidence and its conclusions. (Italics added.)

In obedience to this directive, more than twenty hours of testimony were taken from petitioner by the full committee between February and May 1958 and a dozen character affidavits, references and letters were put into the record. Another year passed, however, before the committee was ready to announce its decision once again refusing to certify petitioner for admission to the bar. The committee filed with the court below at that time a report explaining its decision. Of the seventeen members of the committee, eleven signed this adverse report; six commissioners signed a minority report recommending admission. (App. 8, 28).

The court below affirmed its committee's decision on November 19, 1959 and, after a petition for rehearing, on January 21, 1960. Of the seven members of that court, four joined in the *per curiam* opinion upholding the committee majority; three justices filed two dissenting opinions recommending admission. (18 Ill. 2d 182, 163 N.E.

---

[3] App., 7. This language seems to have been adapted from Commissioner Rothschild's 1957 dissenting opinion (App., 6) and seemed also, in this context, implicitly to rule out any further questions about petitioner's possible affiliations. See, also, 1959 Brief for the Applicant [in the Supreme Court of Illinois], 3-5.

2d 429; App., 34, 53, 78). It is of this decision and decree by the court below that review is sought.

3. What Is Wrong With George Anastaplo? As has been indicated, there are two principal grounds for dissatisfaction with the qualifications of petitioner to practice law, grounds that are emphasized in every opinion by the Illinois Supreme Court and by its committee in which his application for admission has ever been denied. First, the Illinois authorities do not approve of petitioner's views, stated on request and over his objection, on the right of revolution and the Declaration of Independence. (*E.g.*, R. 154-157, 158-169, 174-182, 237-249, 391, 397-8). Sometimes the Illinois authorities say that these opinions are not vital but that they make other aspects of the case more important; at other times they recognize what has been true throughout, that these views are crucial to their adverse reaction to petitioner's application. This is one ground for dissatisfaction with petitioner's qualifications.

Second, the Illinois authorities do not approve of petitioner's conscientious refusal to answer any inquiries into his political affiliations and associations.[4] This has meant, in the current proceedings, that he has had to refuse inquiries about membership or possible membership in the Republican Party, the Ku Klux Klan, the Com-

[4] Commissioners Moses and Young, who voted against petitioner's admission to the bar, are also on record as warning him that they would regard adversely his refusal to answer questions they were asking about religious beliefs. They insisted that such beliefs bore upon petitioner's ability to take in good faith the oath of office of the attorney. (*E.g.*, R. 208-210, 215-217) The committee finally ruled out such questions, but only after six weeks of sharp conflict over them and after they had had their prejudicial effect. (R. 292). Petitioner had refused, of course, to answer such inquiries, a refusal that the committee does not choose to rely upon for excluding him from the bar. In fact, this important episode and its significance are not mentioned either in the committee report or in the opinion of the court below but only in Mr. Justice Bristow's dissenting opinion. App., 58-59, 74.

munist Party, the Silver Shirts of America, and the Democratic Party.[5] The court below and its committee have chosen in their opinions to single out as significant for passing on petitioner's character and fitness the Communist Party question among all those that petitioner has refused on principle to answer.

The connection between these two grounds for dissatisfaction should be obvious to any careful reader of the record, even though the Illinois authorities choose to ignore it: it is historically true that questions about affiliations were first asked only after and only because members of the committee did not approve of petitioner's views about the right of revolution;[6] and it is still true that members of the committee persist in their questions about affiliations partly because they do not approve of what petitioner says about the right of revolution and the Dec-

---

[5] (R. 43, 46, 144-145, 203-204). The Republican and Democratic Parties inquiries emerged as a result of the attempt by Commissioners Bane and Young to secure an answer about petitioner's political affiliations by exploiting the fact that petitioner had served on several occasions as the official election judge in his Chicago precinct. (R. 26-32, 201-205). (See, for an appraisal of this episode, App., 63).

[6] See R. 368-380, where the proper sequence of inquiries in petitioner's first appearance before the committee in 1950 is described in considerable detail. This description was prompted, in part, by the serious distortion of that sequence in the 1954 opinion of the court below (3 Ill. 2d, at 473-474). Yet, despite petitioner's detailed analysis of the 1954 error of the court below, the distortion is preserved in the current opinion of that court. (App., 35-36). The court below stoutly refuses to face the fact that the sequence of inquiries is exactly the reverse of that described in its 1954 and 1959 opinions: questions about affiliations came only after petitioner's answers about the right of revolution and only because committee members were hostile to the legitimate opinions he had expressed on request. There can be no reasonable doubt about this. An appreciation of the proper sequence of inquiries emphasizes the infringement upon petitioner's rights under the First and Fourteenth Amendments to freedom of speech. See also petitioner's 1955 Jurisdictional Statement (in this Court), 10-15, 26-27.

laration of Independence. Thus, even the headnotes of the Illinois Reporter reflect what is all too evident in both the record and the opinion:[6a] there is an intimate connection in the attitude and action of both the court below and its committee between petitioner's views on the right of revolution and his refusal on principle to answer questions about political affiliations.[7]

[6a] The Illinois Reporter introduces his four-part summary of the opinion with the following captions (18 Ill. 2d 182-183):

"1. Attorneys at Law—applicant for admission to the bar must establish that he possesses the necessary qualifications."

"2. Same—when applicant's views concerning established authority and orderly governmental processes cast doubt on his ability to take oath."

"3. Same—questions concerning Communist Party membership are relevant in determining applicant's ability to take oath in good conscience."

"4. Same—when refusal to answer questions as to membership in Communist Party justifies denial of certificate of fitness."

[7] In the current hearings, petitioner raised constitutional objections under the First and Fourteenth Amendments to questions about his views on the right of revolution, objections which were overruled by the committee. (R. 154-157). As is reported in the record, he nevertheless consented to set forth his views on this subject. Not only did he want to keep the issues as precise and limited as possible and to cooperate with the committee as fully as possible, but he recognized that his views on the right of revolution and the Declaration of Independence were already known to the committee and had been critical in the committee's 1950-1951 decision to ask and insist upon questions about his possible political affiliations (see Note 6).

Furthermore, it can be argued that there is an important practical difference between (1) discussion of the right of revolution and (2) inquiries into one's political affiliations (which petitioner has always refused to answer). The first relates to an applicant's understanding of the Constitution, to which an oath is to be taken by the attorney; the second relate to one's political views, to one's views on the best government or party under the Constitution. Our constitutional system *can* usually operate properly if the first is left open to discussion while the second set of views is left to the individual to disclose and act upon as he wishes. The second has to be protected in this manner, if only because of party spirit and of the harm that can befall the Constitution should this area not be kept beyond the inquiry (and hence control) of a particular partisan government. (This concern is reflected, for instance, in the protec-

4. What Is Right With George Anastaplo? These, then, are the two grounds for dissatisfaction with petitioner's qualifications for admission to the bar. Yet both the court below and its committee have made disclaimers that might have led one to believe that they take neither of these grounds seriously. Thus, it is conceded by the committee majority (App., 14):

> that the views expressed by the applicant with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in themselves reveal any adherence to subversive doctrines.

An attempt is then made to bypass this concession by the effort to make something out of petitioner's suggestion that there might be circumstances in which decrees of courts should be resisted. (App., 15, 40). But the qualifications insisted upon by petitioner—for instance, that such resistance should be directed to restoration of constitutional government when the Constitution has been subverted—are ignored. (R. 174-182, 238-249; App. 55).

---

tion given the secret ballot.)

It would be better, of course, if bar admission committees were required to steer clear altogether of discussions about the right of revolution as well: the distortion of petitioner's views on this subject, both in the committee report and in the opinion of the court below, should provide warning enough against such inquiries and discussion. But, in any event, petitioner has sought to keep the issues separate: he has spoken freely about his views on the Constitution (and, therefore, on the right of revolution); he has consistently refused to answer questions about possible membership in any number of political organizations, "subversive" or otherwise.

It is clear that petitioner would never have gotten into the "trouble" he has if he had quickly disavowed his surprisingly orthodox views on the right of revolution (R. 368-374); and it is also clear that he only made matters worse for himself by invoking what he conceived to be an historic American right, that of keeping one's political affiliations to oneself. (See Committee's Point 3, App., 17.)

The second disclaimer is seen in the concession, which petitioner could not induce the committee to make until the fifth of his six appearances before them (R. 265), that

> . . . no one has stated [orally or in writing] to this Committee that you are or have ever been a Communist or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the organizations or any of the organizations listed as subversive by the Attorney General's list . . . [8]

An attempt is made to minimize *this* concession by the claim that the refusal by an applicant to answer committee

---

[8] The concession made, that there is no adverse evidence with respect to petitioner's political affiliations, points up the significance of the right of revolution inquiries. It is evident that petitioner's views on revolution take on importance as the committee implicitly concedes it has no other basis for insisting on asking questions of petitioner about the Communist Party or the Ku Klux Klan. (See Note 22, as well as Committee's Point 3, App., 17 and R. 171.)

It should be emphasized that the concession of the committee—that no one had stated, orally or in writing, that petitioner had been or was a member of any organization such as the Communist Party or the Ku Klux Klan—refers to an applicant who had been before the committee on and off during a decade of excitement and suspicion. His case has been publicized throughout the State of Illinois, as well as nationally, and his name *and* photograph have been published throughout the State. (*E.g.*, Chicago Daily News, September 23, 1954; Daily Southern Illinoisan, Herrin, Illinois, September 23, 1954; February 14, 1960). And yet, no one has supplied any adverse information to the committee about petitioner.

Furthermore, the committee and members thereof have made independent inquiries into these matters among prominent citizens in petitioner's home town (Carterville, Illinois); among petitioner's law school teachers and classmates; and among LaSalle Street lawyers who know petitioner well. (R. 60-61; Appendix to [Petitioner's] 1959 Brief, pp. 10-13). See, especially, petitioner's letters to the committee of April 16, 1959 and March 27, 1958, asking that the results of these inquiries be entered upon the record. The refusal of the committee to acknowledge what *it* considers fruitless inquiries is itself an aggravation of the due process irregularities in this case.

Thus, the concession of the committee is one that is made even more significant by the circumstances of this case and by several unsuccessful efforts of the committee to turn something up. Further inquiries could have been made with the aid of the subpoena powers the committee possesses (Rule 10)—but then, the committee knows as well as any reasonable reader of the record that the issue in this case is neither Communism nor the Ku Klux Klan. (The Rules of the Committee are set forth in the Record, in petitioner's Appendix to the 1959 Brief, 7-9.)

members' questions about these organizations constitutes obstruction of the committee's efforts to determine that applicant's character and fitness, a claim which is not supported however by reference to any rule or statute or by reference to anything in the record that has been made in this case. Even though obstruction and "recalcitrance" are suggested (App., 27, 53), it is convenient for the Illinois authorities to say nothing of the questions about religious beliefs which the recalcitrant petitioner resisted and obstructed for six weeks and which the committee ruled out of consideration only after the member pressing the questions made the tactical error of relying for support on a bizarre 1856 case that had long been overruled. (R. 144, 210, 231, 292, 270-287, 301-313).

The evidence with respect to petitioner's character and fitness is admitted by all parties to be favorable, except for the significance of his views on the right of revolution and the significance of his refusal on principle to answer questions about any political affiliations and associations. The significance of all the evidence for character and fitness purposes is presented with great care by Mr. Justice Bristow in his dissenting opinion, and is evaluated also by Justices Schaefer and Davis in their dissenting opinion as well as by the committee minority. (App., 53, 78, 28). The position of petitioner is set forth in considerable detail throughout the record and is presented by him in a comprehensive manner in his Closing Argument before the Committee on Character and Fitness. (R. 361-418).

5. **How the Federal Questions Are Presented.** The federal questions sought to be reviewed were raised by petitioner's pleadings, objections and briefs at each stage of the proceedings. Thus, at the outset of his Supplementary Petition for Rehearing of June 25, 1957, he says,

> I should like to emphasize, lest I be thought to waive them, the claims heretofore made to rights guaranteed by the First and the Fourteenth Amendments—rights

to freedom of speech, of the press, of assembly, and to due process of law and the equal protection of the laws, all of which rights seem to me to be infringed or abridged unconstitutionally by my continued exclusion from the bar.

A detailed application of federal constitutional principles to this matter may be found in the Transcript at, among other places, R. 35, 38-39, 42, 43, 65, 92-97, 99-103, 106, 119-122, 154-157, 172-173, 185, 190, 191-201, 382-401. The briefs and petition for rehearing filed in the court below also invoke these principles. Finally, both the court below and its committee in their opinions and reports addressed themselves to and passed upon various questions raised under the Constitution of the United States. In short, there can be no doubt that federal questions were timely and properly raised so as to give this Court jurisdiction to review the judgment in this case on writ of certiorari.

Reasons for Granting the Writ.

1. It is well to emphasize at the outset that the question of membership in the Communist Party or in the Ku Klux Klan is not an issue in this case, but at most only the effect of a conscientious refusal to answer inquiries about such membership when it is conceded that there is no allegation or evidence of membership, when the inquiries occur only in the context of badgering about philosophical and political views, particularly views about the right of revolution, and when silence is couched in the form of a refusal to submit to something deemed by petitioner to be in the nature of a test oath and to be improper, ungentlemanly and unconstitutional inquiries.

Many of the considerations that prompted this Court to review the *Schware* and *Konigsberg* cases, within a year after declining to review the 1954 opinion of the Supreme Court of Illinois in petitioner's case,[8a] would seem

[8a] Review of *Konigsberg* was granted again March 7, 1960.

to call for a review of this matter now. Some of these considerations are elaborated in petitioner's Jurisdictional Statement filed with this Court in 1955, copies of which are provided.[9]

2. Still, a brief indication of some of these reasons for granting the writ, and of additional reasons which are peculiar to the present case, would seem in order. One consideration which is novel to this matter is that petitioner has been subjected to the deprivations he has suffered at the hands of the Illinois authorities partly because of the views he was required[10] to express about the right of revolution. The expression of these views is at the root of his trouble, both originally and, as is evident in the transcript and the current hearings, to a remarkable extent even today. (App. 1, 14, 17, 40; R. 368-380). Thus, even the 1957 rehearing order of the court below recognized that (App., 7).

> The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of [the *Konigsberg* and *Yates* cases].

To penalize petitioner for the expression of his opinions on these matters, whether these perfectly proper opinions are the primary reason or only a contributory cause of the action of the Illinois authorities, would seem to raise serious problems under the First and Fourteenth Amendments as these constitutional provisions are understood by this Court.[11] Furthermore, it would seem a sufficient

---

[9] This Jurisdictional Statement is incorporated in the record of the current proceedings. (R. 384). The 1950-1955 phase of this controversy is recorded at 3 Ill. 2d 471, 121 N.E. 2d 826; 348 U.S. 946, 349 U.S. 908.

[10] (R. 154-157; See Note 7).

[11] *Gitlow* v. *New York*, 268 U.S. 652; *Cantwell* v. *Connecticut*, 310 U.S. 296, 303; *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624. (See Notes 16 and 24).

reason for review by an American Supreme Court that there is here a case in which a decade-long exclusion from the bar has resulted from an applicant's stubborn defense of the principles of the Declaration of Independence.

3. Related to this reason for review is the fact that the Illinois authorities have permitted themselves to be diverted from the duty prescribed by law, the duty of passing upon the character and fitness of applicants for admission to the bar.[12]

This is a long record, perhaps the longest ever made in an Illinois bar admission proceeding.[13] It is appropriate that one of the dissenting opinions opens with the report (App., 78).

> As a result of the exhaustive hearings before the Committee, we now have far more information as to the moral quality, the legal capacity and the political views of this applicant than is ordinarily the case.

Thus, this is not simply a case of a refusal, amounting to obstruction of the judicial process, to comply with the known, necessary or accepted requirements of bar admission proceedings. In fact, many requirements and inquiries have been newly-devised for this applicant. Furthermore, the alleged obstruction—the refusal on principle to answer questions about political affiliations—came very early in the current proceeding. Indeed, the committee and the court below knew even before the rehearing

---

[12] Six members of the committee conclude their minority report, "We now know the applicant is fit and of good character. On this record, it is pure sophistry to hold that his refusals to answer have prevented our determining his character and fitness. To deny admission under these circumstances would be a disservice to the Bar and a violation of the traditional concepts of fairness and due process. To do so under the shelter of burden of proof is a retreat to formalism we are unable to join." (App., 33).

[13] Some applicants are deemed by the committee to have been sufficiently "tested" for their character and fitness for bar admission purposes in appearances that last only five minutes before a subcommittee of two members. (R. 257).

was ordered that petitioner would maintain his former position and refuse to answer questions of a certain kind.[14] Moreover, the 1957 rehearing order issued by the court below implicitly excludes questions about political affiliations.[15]

Almost two dozen hours were spent by petitioner in his six appearances before the full committee. This fact alone suggests that the committee was interested in more than petitioner's refusal to answer political questions. It is hardly fair then for the committee to claim now that the refusal to answer certain questions about political affiliations should be sufficient to disqualify an applicant. One must wonder what the purpose of the four months of hearings was and why it took a year, after the close of the hearings, before the committee could decide that nothing mattered after page 34 of the 400-page transcript. (See

---

[14] Petitioner's Supplementary Petition for Rehearing, June 25, 1957; App., 1, 5.

[15] The committee recognized that this order (App., 7) was controlling and therefore tried to fit its affiliations inquiries into one or another of the three categories permitted and ordered by the court. (1959 Brief for the Applicant, 3-5; *e.g.*, R. 32, 76-77, 100, 173, 219; App., 17-18; Note 3, above. See, also, Kalven-Steffen *amici* brief, 3-7).

This order of the court is the nearest petitioner has come to securing anything like a pleading, showing him what the case is about and what to expect. (Petitioner made several requests for advance notice of what would be inquired into during his four months of appearances before the full committee, especially after it became evident that the limits set by the court below were not to be respected by the committee. The committee repeatedly refused to give such notice. See, *e.g.*, petitioner's letters of March 3, 1958, March 27, 1958, and April 15, 1958 (and the committee response of April 16, 1958), all of which are in the Record.)

Neither the committee report nor the opinion of the court below addresses itself to the complaint of petitioner that the affiliations inquiries were outside the scope of inquiry laid down by the 1957 order of the court below. This refusal to abide by carefully designated limits—by "the law of the case"—reinforces the due process arguments made by petitioner. In addition, no serious attempt is made to apply such standards as "character and fitness" in their normal and traditional sense.

Note 18, below.) It would seem to be in the interest of this Court to review such disregard of ordinary judicial practice, especially since the state courts control the entrance into the bar of this Court.[16]

4. The force of these considerations is augmented when one assesses the character and fitness evidence in this record. There are the very favorable character references and affidavits collected pursuant to committee rules and on committee forms. No further comment on these appraisals of petitioner is necessary except for the suggestion that they be studied. Nor is there in the record anything adverse to petitioner's "character and fitness", aside from the possible significance of his long-standing refusal to answer certain questions.[17]

---

[16] Petitioner made an unsuccessful attempt to secure admission directly to the bar of this Court after he failed to secure review of his case in 1955. 349 U.S. 903. (See, also, Note 24.) Petitioner respectfully suggests that this Court reconsider in the light of subsequent developments in his case its 1955 decision denying his Motion for Leave to File an Application for Admsision to the Bar of the Supreme Court of the United States. It should be noted, in this connection, that petitioner, before pressing for appellate review on this occasion, unsuccessfully explored possibilities for an honorable settlement of this controversy "out of court." (App., 81-82).

The outcome of this litigation bears not only upon petitioner's right to practice the profession for which he has been trained but also, as a practical matter, upon his prospects as a university and law school teacher. (R. 249-253). Petitioner, who is writing a PhD dissertation (tentatively entitled, *Notes on the First Amendment*), is presently serving as Lecturer in the Liberal Arts and Research Associate in University College, The University of Chicago.

[17] Even if it should now be shown that petitioner is a member of either the Communist Party or the Ku Klux Klan, such membership should not on this record and in the light of all the other evidence be enough to counter the overwhelming effect of the record in petitioner's favor (assuming, for this purpose, even the committee's severe opinion about the Communist Party and about the Ku Klux Klan).

The question still remains, that is, whether a known member of either the Communist Party or the Ku Klux Klan can and should be excluded on that ground alone. Certainly, the Attorney General's "list" often relied on in these proceedings has not been either designed or tested for bar admission purposes.

What about the unanswered questions? The committee was driven to admit it had no evidence linking petitioner with any of the organizations about which he has refused to speak. (Transcript, 265). No one has explained why any of the unanswered questions make any difference in petitioner's case, even though these are questions of the kind that should require even more rigorous justification than would the questions that the committee might ordinarily ask.[18] The concession of the committee that it has no adverse evidence points up the element of protest in petitioner's refusal and hence the problem of freedom of speech raised by his exclusion from the bar.[19]

---

[18] The one "subversive" political organization question for which an attempt to lay a foundation was made came from Commissioner Bane in an incident which is described by Mr. Justice Bristow as follows: "At the very first session, applicant was asked whether he was a member of any nationality organization. After he replied that he was not, he was asked whether he was a member of a [Greek] nationality organization that had been designated by the Attorney General as subversive. Applicant refused to answer, explaining that when the question designated the organization as subversive, its intent was to elicit information about political affiliations. To such inquiry he must object on the ground that it infringed his rights under the first and fourteenth amendments, was beyond the province of a Character and Fitness Committee, and, more particularly, was outside the terms of the Supreme Court [of Illinois] rehearing order of 1957. He pointed out that if the committee was interested in eliciting information, it already had the answer to the question, since he had just stated that he was not a member of *any* nationality organization." (App., 56).

A "foundation" had been laid for this inquiry by establishing first that petitioner was of Greek descent! (R. 33). The question whether he was a member of this organization was the first political question petitioner refused to answer during the current proceedings. (R. 34-41). Presumably, the committee's investigation was irretrievably "obstructed" from then on through page 420. It is submitted that this episode, which reflects anything but fair play, is really symbolic of all the affiliations inquiries in this case. And yet the committee can suggest that petitioner's principled refusals to answer such questions interfere with a proper determination of his character and fitness. Everyday notions of due process, of how judicial bodies should regulate themselves, are sufficient to condemn behavior of this kind. See petitioner's 1959 Brief in the Supreme Court of Illinois, 8-12.

[19] See petitioner's 1955 Jurisdictional Statement, Supreme Court of the United States, 28-33.

5. There never has been a rule or statute in Illinois providing that an applicant must answer all questions put to him by character committee members. Neither the committee nor the court claims otherwise.[20] A study of the record indicates why Illinois dares not establish such a rule; there are too many impulsive members on every character committee, with the result that there are several questions petitioner refused to answer which the court below and its committee would prefer to ignore (such as the

---

[20] During the course of petitioner's examination by the committee, the chairman of the committee, at every point where the significance of a refusal to answer questions was discussed, conceded implicitly or explicitly that such a refusal was but one piece of evidence to be evaluated as part of the record. (R. 37, 116-117, 142, 269-270, 337-338). A careful examination discloses that there is not in the record any warning that a refusal to answer a particular question would be sufficient grounds for exclusion. Such a warning (based on a rule or statute) would have to be given in order to avoid the holding of the *Konigsberg* case, 353 U.S. 253, at 261. If, however, the warning referred to in the *Konigsberg* opinion is considered to have been given petitioner, then this Court is faced with the problems that were set aside as unnecessary to reach in the *Konigsberg* case, the "far reaching and complex questions relating to freedom of speech, press and assembly." (One of the most puzzling aspects of this case is seen in the committee argument that an exchange of letters between committee and petitioner in September 1958 deprives petitioner "of any benefit from the decision in the *Konigsberg* case." (App., 20). These letters are set forth in the Appendix to the 1959 Brief for the Applicant, 14-19. The authors of this passage in the committee report must have relied on a mistaken recollection of what these two letters contain. Not the least curious aspect of the committee majority report is the remarkable suggestion that an applicant who disagrees with the committee majority in interpreting or applying the opinions of this Court is thereby to be considered of dubious character. App., 27. See Note 23.) (See, also, on "warning," R. 3, 5-6, 42, 212.)

The references to the *Konigsberg* case should not conceal the fact that in certain essential respects petitioner's case is more like the *Schware* case: the role of the unanswered questions is minimized if not virtually ruled out by the admissions made by the committee and the striking impression that remains is the refusal of the committee to give due weight to the "dictates of reason" and to the overwhelming character of the evidence in the light of the "character and fitness" purpose of the committee. (353 U.S. 232, at 249).

questions about membership in the Republican and Democratic Parties, about petitioner's religious beliefs, and even about membership in the Ku Klux Klan and the Silver Shirts of America.[21]

These unanswered questions are passed over without mention in reports and opinions, while those about the Communist Party are emphasized.[22] In fact, it was left

---

[21] It should be noted that every commissioner who insisted in the course of the proceedings upon any question on whatever subject—upon any question which petitioner refused to answer—voted against petitioner at the end of the proceedings (even after the committee chose either not to mention his particular question in its report or to rule it out of its consideration). An applicant can say "No", and perhaps the committee may agree that he did so properly; but the thwarted commissioner can also say "No" when the votes are cast—and only this Court is left to say whether he may properly do so in the face of a record which is overwhelmingly favorable to an applicant.

[22] But, it might now be argued, the Illinois authorities do not insist that an applicant must answer every question asked him; rather, they insist only upon those questions which, after extended reflection and long deliberation, the character committee decides the applicant should have answered. Even if one overlooks the difficulty faced by an applicant who must predict which questions the committee might later vote to take seriously, the problem remains, Why should these specially designated questions be singled out, as distinguished from the others? Is it because of the evidence the committee has, or because of petitioner's views on the right of revolution?

With respect to the first of these two possible explanations, it should be pointed out that there is no less evidence in the record of membership in the Ku Klux Klan, for example, than there is of membership in the Communist Party. And yet the unanswered question about the Communist Party, not that about the Ku Klux Klan, is emphasized. That leaves, as a possible explanation for this distinction among questions and as a justification for the insistence upon the Communist Party question, only petitioner's views on the right of revolution (and the Declaration of Independence). But here the Illinois authorities draw back and in effect say, We need give no reasons why we insist upon certain unanswered questions and ignore other unanswered questions, or why we insist upon them of this applicant and only of this applicant; after all, we are responsible for the quality of the Illinois bar while the Constitution can look out for itself; besides, the Russian Communists are terrible people.

to Mr. Justice Bristow in his dissenting opinion to notice all the unanswered questions and to point out that, very far from adverse evidence, petitioner's refusal to answer improper questions may be quite favorable evidence indeed for character and fitness purposes. (App., 58, 74, 77-78).

6. The cardinal judicial sin committed both by the court below and its committee is the refusal to approach and evaluate the record as a court should and would do in the usual case. This refusal to take due account of an exhaustive examination conducted under the direction of the court below, as well as the refusal to insist upon a proper foundation for political questions and upon a showing of relevance and pertinence for political inquiries —all these departures from sound judicial practice raise serious questions under the due process and equal protection clauses of the Fourteenth Amendment. On the other hand, the insistence upon the political inquiries found in this case, and the continued exclusion of petitioner for a refusal to answer such inquiries in this context, raise serious freedom of speech questions under the First and Fourteenth Amendments.

These are questions that should bear upon the decision whether a review of the case is appropriate. Reinforcing these considerations is the likelihood of a marked injustice in this matter, one that cannot but continue to have serious consequences for the independence and integrity of the bar.

7. Perhaps it is unfashionable these days to urge as still another reason for granting review the suggestion that the Illinois authorities have cavalierly refused to apply the most relevant law of the law—the rulings of

this Court in the *Schware* and *Konigsberg* cases.[23] It is appropriate that petitioner, who has been unjustly attacked as a threat to constitutional government because of his carefully qualified views on the right of revolution and the Declaration of Independence, should be subjected to judicial action that amounts to a deliberate refusal by Illinois to abide by the rule of law: petitioner can claim what the Illinois bar authorities cannot, that he has always obeyed the law of the land and the decrees of judicial tribunals..

---

[23] (353 U.S. 232, 252). Attempts have been made to avoid the ruling in these cases by reliance upon the *Beilan* and *Lerner* cases, 357 U.S. 399, 468. But the *Beilan* and *Lerner* situations seem clearly distinguishable from bar admission matters. For *Beilan* and *Lerner* do no more than apply a public employees doctrine that had been long established by cases such as *Adler* v. *Board of Education*, 342 U.S. 485, and *Garner* v. *Los Angeles Board*, 341 U.S. 716, when the bar admission cases of *Schware* and *Konigsberg* were decided. *Beilan* and *Lerner* deal with situations where, partly because of the statutes involved, a refusal to answer questions was regarded as *ipso facto* disqualifying for public employment. A refusal to answer constituted incompetency, and even substantial obstruction; a warning to this effect was clearly given by the state authorities; and the record is primarily devoted to this warning. In addition, these two cases deal with situations in which evidence of the proscribed affiliations was in the record.

These distinctions are pointed out in petitioner's letter to the committee, September 23, 1958, which is found in the Appendix to the 1959 Brief of the Applicant, 15-19, as well as in the 1959 Brief of the Applicant, 14-15. (See Note 20, above.) See, also, Kalven-Steffen *amici* brief, 8-13, which includes the observation, "In view of the Committee's own handling of the *Beilan* and *Lerner* precedents, it adds a note of irony to the record that the majority made so much of Anastaplo's intransigence in failing to capitulate to their reading of the two cases."

Similar distinctions apply to the use of the *Barenblatt* case by the court below. See, *e.g.*, Mr. Justice Bristow's dissenting opinion (App., 66-68, 74).

8. These would seem to be reasons enough for reviewing this case.[24] Petitioner has developed his constitutional arguments at considerable length and with great care in the hearings before the committee and in the various briefs he has filed which are part of the record. Analyses of the evidence and additional arguments are found in the dissenting opinions of members of both the court below and its committee and in the *amici* brief of Professors Kalven and Steffen.

Indeed, it would seem that there are enough reasons not only for granting the writ of certiorari but even for a summary judgment, on the basis of the preliminary papers and the record, reversing the judgment below and ordering the Illinois authorities to provide for petitioner's admission to the bar, thereby sparing him the expense and

---

[24] In addition to the application of other constitutional limitations upon state action, does not this Court have the power and obligation to examine the methods employed in the state courts which supply the bar of this Court and to correct state action which excludes an applicant who is qualified to practice both in his state and before this Court? Such a power would seem to rest in the paramount judicial body in the United States and would be comparable to Congressional power to evaluate and correct State electoral requirements. Although the Congressional power is derived from an explicit constitutional provision, it provides a model for a Court that has never hesitated to enforce implied prohibitions against the burdening by states of federal instrumentalities. *McCullough* v. *Maryland*, 4 Wheat. 316 (1819). Of course, the power of states to admit is not, "while this Court sits," the power to deprive this Court of counsel. But this state power, if not examined scrupulously both for unwisdom as well as unreasonableness by this Court in situations where departures from usual and accepted practices are evident, is the power to affect adversely the quality of the bar of the Supreme Court of the United States as well as of the subordinate federal courts which are more limited in self-protection. The assertion of any latent power to examine state bar admission policies and practices would be particularly appropriate in an era when scholarly research and judicial action seem to be limiting the scope of previously accepted constitutional limitations upon governmental action.

effort of further litigation.[25] Such decisive action would help to correct the abuses that have developed the past decade in bar admission practices throughout the nation.

It is fitting to close with an emphasis upon the record made in this case, especially since that record has been neglected thus far by the court below and its committee. The best substitute for the record is Mr. Justice Bristow's dissenting opinion. In addition, the Closing Argument by George Anastaplo before the Committee on Character and Fitness provides for the curious an account of what petitioner has been doing and why.[26]

Conclusion.

For the foregoing reasons, relating to both the common good and individual rights, it is requested that the Court grant this petition for a writ of certiorari and otherwise provide that justice finally be done in this matter.

Respectfully submitted,

GEORGE ANASTAPLO, *Petitioner,*
Counsel pro se.

Chicago, Illinois
March 18, 1960

---

[25] All expenses connected with this controversy have been borne throughout by petitioner.

Copies of the documents referred to here—including the briefs below, the opinions of the court below and of its committee, and the *amici* brief—are provided in sufficient quantity for this Court. In addition, nine sets of the most critical part of the record (that is, the entire transcript of petitioner's six appearances before the committee in 1958) are provided in the form prepared for the use of the court below, a form which may be even easier to read than a printed version would be. (The Secretary of the Committee on Character and Fitness has kindly provided petitioner these sets.)

[26] (R. 361-418). This Closing Argument of May 26, 1958 has been reprinted in its entirety in Volume 19, Number 4, of The Lawyers Guild Review, copies of which are provided for the convenience of the Court.

INDEX TO APPENDIX TO PETITION FOR A WRIT OF CERTIORARI.

	PAGE
I. Orders of the Committee on Character and Fitness in 1957 (before a rehearing was ordered by the Supreme Court of Illinois)	1
Order of June 12, 1957 denying rehearing	1
Order of July 2, 1957 denying rehearing	1
Dissent of Commissioner Rothschild	2
Dissent of Commissioner Sawyier	6
II. Order of the Supreme Court of Illinois providing for a Rehearing, September 17, 1957	7
III. Reports of the Committee on Character and Fitness, April 9, 1959	8
Majority Report	8
Minority Report	28
IV. Opinions of the Supreme Court of Illinois, 18 Ill. 2d 182, November 19, 1959, January 21, 1960	34
Per Curiam opinion	34
Dissenting opinion of Mr. Justice Bristow	53
Dissenting opinion of Mr. Justice Schaefer and Mr. Justice Davis	78
V. Letter of Committee Secretary, February 17, 1960, in response to Petitioner's letter of February 5, 1960	81
VI. Constitutional Provisions and Statutes Involved	82

I.

ORDERS OF THE COMMITTEE ON CHARACTER AND FITNESS IN 1957.

June 12, 1957

It is ordered that the petition for rehearing of George Anastaplo, applicant, be and the same is hereby denied, without prejudice, however, to applicant to file an amended or supplemental petition for rehearing with the committee within 15 days from the day hereof, such amended or supplemental petition to include, among other things, additional information for the committee in the following areas:—

(a) Applicant's willingness to answer questions heretofore asked (but not answered) in the prior proceedings, which questions were deemed pertinent and proper by the Illinois Supreme Court (*In re Anastaplo*, 3 Ill. 2d 471);

(b) Applicant's views with respect to the overthrow of government by force.

July 2, 1957

This cause coming on to be heard on the sworn supplementary petition for rehearing and discussion having taken place by the Commissioners and

The commissioners having before them the original record, the original petition for rehearing and supplementary petition of applicant, and it appearing to the Commissioners that except as supplemented to date by insignificant

facts pertaining to applicant's life, the matter is virtually in the same posture as it appeared before the Illinois Supreme Court, and the Committee is of the opinion it has no alternative but to deny the said petition.

Now therefore, it ordered that the same supplementary petition of applicant be and the same is hereby denied on the authority of *In Re Anastaplo*, 3 Ill. 2d 471.

Dissent of Edward I. Rothschild, a Member of the Committee, to the Action of the Committee Denying Applicant's Petition for Rehearing.

On July 2, 1957, the Committee on Character and Fitness for the First Appellate Court District denied the petition of George Anastaplo for rehearing on his application for certification for a license to practice law in Illinois. In refusing to consider the matters raised by the petition, the Committee, in my opinion, failed to discharge its proper function and its duty to the Supreme Court of Illinois. Because of the public nature of the matter, I note my disagreement with this action and my reasons therefor.

George Anastaplo graduated from the University of Chicago Law School, passed the Bar Examination, and first applied to this Committee in October of 1950. His record appeared to be satisfactory and he submitted the usual affirmative evidence of good character and moral fitness.

In the course of several hearings before this Committee in 1950 and 1951, two serious problems appeared to the Committee. First, the applicant refused to answer questions as to whether or not he was a member of the Communist Party. And, second, he expressed certain beliefs in the right of revolution.

With respect to the first problem, that of refusing to answer questions, the applicant explained on several occasions that he did not think they were proper questions for this Committee. A unanimous Committee, and subsequently the Supreme Court of Illinois, disagreed with this view, though neither expressed any doubt of the applicant's sincerity in his position. In this connection, it should be noted that neither at the time of its original action in 1951, nor at this time, does the Committee have any substantial evidence or suggestion of evidence that the applicant is or ever was a Communist.

With respect to applicant's views as to the right of revolution, it seems to me, as it did at the time of our original action, that the record in this case, fairly read, indicates that applicant's beliefs are philosophical and abstract and deal solely with political theory and not with any movement or thought toward the violent overthrow of the government by force. If this is so, these beliefs do not constitute grounds for denying applicant a certificate and cast no doubt in my mind as to applicant's good faith in his oath to uphold the State and Federal Constitutions.

This Committee in its report of its original action in 1951, based its denial of a certificate solely on applicant's refusal to answer questions which the Committee considered relevant to its inquiry. The Committee reached no conclusion with respect to applicant's views on violent overthrow and stated that these views were not the basis of its action:

> "The Committee reached no conclusion as to whether the applicant's views were purely philosophical and academic or whether they were also a basis for conduct or action, however deferred." Report of the Committee (on original application), p. 15.

The Supreme Court of Illinois held that the Communist questions should have been answered and denied applicant's application for a license, *In re Anastaplo*, 3 Ill. 2d 471, 121 N.E. 2d 826 (1954), noting that the Committee had not reached a conclusion as to applicant's views on revolution. Certiorari was denied, 348 U.S. 946.

On May 6, 1957, the Supreme Court of the United States decided *Konigsberg* v. *The State Bar of California and the Committee of Bar Examiners*, ... U.S. ....., 25 U. S. Law Week 4281. There, an applicant for admission to practice law in California refused to answer the same kind of questions about Communism and for the same kind of reasons. The Supreme Court of the United States held that on the record in that case California could not constitutionally deny him a license to practice law.

Konigsberg differs from the Anastaplo situation in two respects. First, there was substantial independent evidence of Communist Party membership by Konigsberg, whereas there is none as to Anastaplo. If California could not question Konigsberg about Communist Party membership, despite such independent evidence, I do not see how we can in the absence of any such evidence, unless Anastaplo's thoughts on revolution permit us to do so.

The second distinction between the *Konigsberg* case and Anastaplo presents a more difficult problem and one which this Committee, in my opinion, has a duty to consider. That is the problem of Anastaplo's belief in the right of revolution. In *Konigsberg*, the applicant stated categorically that he did not believe in the overthrow of the government by force and apparently this satisfied the Supreme Court of the United States. Anastaplo, on the other hand, states that he does believe in the right of revolution and the use of force.

The question—and in my opinion the sole question—which must be determined, is whether Anastaplo's beliefs keep him outside the shelter of *Konigsberg*. This question is a question of fact upon which this Committee should either reach a conclusion on the old record and the current petition for rehearing, or, if it is unable to do so, it should hear further from the applicant on this one issue which was expressly reserved in the prior consideration of this applicant.

The issue is brought clearly into focus by the decision of the Supreme Court of the United States in *Yates, et al.* v. *United States*, ... U.S. ....., 24 U.S. Law Week 4475, decided on June 17, 1957. In *Yates*, the Court distinguished between advocating and teaching forcible overthrow of government as an abstract principle, and efforts to instigate action to that end. *Yates*, of course, deals with the Smith Act and the distinctions there made in the narrow interpretation of a criminal statute are not necessarily controlling here. But to the extent in point, *Yates* is authority for Anastaplo's espousal of abstract doctrine, if in fact that is all there is to his views.

As I read the petition for rehearing, Anastaplo is saying, in effect, "I have done nothing more than Konigsberg did in refusing to answer questions, and my political philosophy is no different than Yates!"[1] If in fact his views are no different than Yates',[2] I see no basis either for requiring answers to the Communist questions or for denying

[1] Nor have Anastaplo's views been tailored to meet *Konigsberg* and *Yates*. The petition for rehearing contains nothing substantial that was not expressed in the original hearings, 6 or 7 years prior to *Konigsberg* and *Yates*.

[2] In my opinion they are less "revolutionary" than Yates' as Yates' are described by the Supreme Court of the United States.

Anastaplo a license. But we cannot determine this by denying the petition for rehearing and not even considering the question.

I realize that ours is a limited function and that the ultimate accommodation of the opinions of the Supreme Court of the United States in *Konigsberg* and *Yates* and the action of the Illinois Supreme Court in *Anastaplo* is for those courts and not for us. But I see no reason to refuse to perform our limited function.

I would grant the petition for rehearing, take evidence on (1) applicant's activities during the period since the denial of his original application, (2) his present reputation, and (3) his views on overthrow of the government by force. It may be that whatever conclusions we might reach on these three subjects, we would be bound to deny a certificate on the basis of *In re Anastaplo*. But at least we would have made the factual inquiry and given the Supreme Court of Illinois the benefit of our consideration of these matters, so that it would be in a position to dispose of the questions raised by this application. We would do no less in the case of any other applicant.

Commissioner Sawyier also dissents from the action of the Committee in denying Applicant's petition for rehearing, on the ground that the applicant should be permitted the opportunity, if he so desires, to make a record specifically in the light of such new considerations as he may deem have come into play by reason of decisions of the United States Supreme Court rendered since applicant was last examined.

II.

ORDER OF THE SUPREME COURT OF ILLINOIS, SEPTEMBER 17, 1957.

The Court entered the following order:
N.R. 780 *In re George Anastaplo*

In 1951 the Committee on Character and Fitness for the First Appellate Court District denied the application of George Anastaplo for admission to the bar of Illinois. This Court affirmed the action of the Committee, (*In re Anastaplo*, 3 Ill. 2d 471) and the Supreme Court of the United States denied certiorari. (348 U.S. 946)

Subsequently the applicant filed with the Committee a petition for rehearing on the basis of certain decisions of the Supreme Court of the United States. The Committee denied this petition.

The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California*, 353 U.S. 252 and *Yates* v. *U. S.*, 1 L. ed. 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.

We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions.

III.

REPORTS OF THE COMMITTEE ON CHARACTER AND FITNESS, APRIL 19, 1959.

[MAJORITY REPORT].

On June 5, 1951, the applicant, GEORGE ANASTAPLO, was notified by this Committee that on the basis of hearings conducted prior to that date he had failed to prove such qualifications as to character and general fitness as in the opinion of the Committee would justify his admission to the bar of Illinois.

The applicant appealed from this ruling to the Supreme Court of Illinois, seeking a reversal of this Committee's action. In proceedings entitled *"In re Anastaplo,"* 3 Ill. 2d 471 (1954), the Supreme Court of this State denied applicant's petition. The applicant then appealed to the Supreme Court of the United States, which court, treating the appeal as a petition for writ of *certiorari*, denied *certiorari*, 348 U.S. 946.

In its opinion the Supreme Court of Illinois held, based upon *American Communications Association* v. *Douds*, 339 U.S. 382, 94 L. ed. 925, 70 S. Ct. 674, *Dennis* v. *U. S.*, 341 U.S. 494, 95 L. ed. 1137, 71 S. Ct. 857, and *Re Summers*, 325 U.S. 561, 89 L. ed. 1795, 65 S. Ct. 1307, that certain inquiries directed to applicant by this Committee concerning applicant's political affiliations and organizational memberships did not violate either the First or Fourteenth Amendment to the Constitution of the United States. (3 Ill. 2d at pp. 480-481.) In reaching this conclusion, our Supreme Court set forth the "established conspiratorial nature" of the Communist Party on the one hand and the position of great influence of attorneys in the community on the other, and its genuine doubt whether a Communist

Party member could in good conscience take the oath required as a condition of admission to practice. (3 Ill. 2d at p. 480.) From these premises it concluded:

> "Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate." (3 Ill. 2d at p. 480.)

Finally, our Supreme Court held that an applicant—knowing that the right to practice law is conditioned upon proof of his good moral character, of his general fitness to practice law and of his good citizenship, and upon the taking of an oath to support the Illinois and Federal Constitutions—may not defeat "pertinent inquiry into his ability to fulfill such conditions by any claim of the right of free speech." (3 Ill. 2d at p. 482.) In this connection it analogized the principles applied in the field of public employment and held that the application for admission to the Bar constituted an agreement "to waive his constitutional right of free speech against relevant inquiry." (3 Ill. 2d at pp. 482-483.) The opinion concluded:

> "We conclude that the committee's inquiry into petitioner's membership in the Communist Party was relevant to a determination of his good citizenship and his ability to take the oath of lawyer in good conscience, and that petitioner's constitutional rights were not infringed upon by such action. On the present record the petition must be denied." (3 Ill. 2d at 483.)

On June 25, 1957, following the decisions of the Supreme Court of the United States in *Konigsberg* v. *State Bar of California,* 353 U.S. 252; 1 L. ed. 2d 810, 77 S. Ct. 722, *Schware* v. *Board of Bar Examiners of State of New*

Mexico, 353 U.S. 232, 1 L. ed. 2d 796, 77 S. Ct. 752, and *Yates* v. *United States*, 354 U.S. 298, 1 L. ed. 2d 1356, 77 S. Ct. 1064, Anastaplo applied to this Committee by supplementary petition for rehearing of his application for admission to the Bar. On July 2, 1957, the Committee denied the application.

On September 17, 1957, the Supreme Court of Illinois entered the following order:

> "In 1951 the Committee on Character and Fitness for the First Appellate Court District denied the application of George Anastaplo for admission to the bar of Illinois. This Court affirmed the action of the Committee (*In re Anastaplo*, 3 Ill. 2d 471.) and the Supreme Court of the United States denied certiorari. (348 U.S. 946.)
>
> "Subsequently the applicant filed with the Committee a petition for rehearing on the basis of certain decisions of the Supreme Court of the United States. The Committee denied this petition.
>
> "The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California*. 353 U.S. 252 and *Yates* v. *U. S.*, 1 L. ed. 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.
>
> "We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions."

On October 17, 1957, at the request of the Committee, acting pursuant to the Court's direction that he be granted a rehearing, applicant filed his responses to the customary questionnaire which the Committee requires be answered by all candidates for the Bar. In responding to the ques-

tionnaire, applicant, for the most part, supplied information to the Committee which supplemented the answers which were given to a previous questionnaire filed with the Committee on October 26, 1950. The Committee has also received the usual attorneys' affidavits and character affidavits from persons familiar with the applicant and has had communications from various individuals whose names were given as references by the applicant and who supplied information concerning Anastaplo's moral character and general fitness to practice as an attorney.

Thereafter, this Committee conducted hearings on February 28, 1958, March 21, 1958, April 7, 1958, April 23, 1958 and May 19, 1958. Applicant appeared personally and gave oral testimony which, including argument, aggregates 420 pages in the record. In addition, the applicant has submitted to the Committee various law review articles, newspaper reprints and other exhibits and has addressed several letter communications to the Committee which appear in the record. During the hearings the Committee repeatedly reminded applicant that he had the right to be represented by counsel and to call witnesses, but he has preferred to rest his case on his own testimony and advocacy. (R. 3, 55.)

Since applicant's original application was denied, he has been engaged principally in the academic life as an instructor and research assistant at the University of Chicago. From the character affidavits and reference letters which have been submitted to us, it would appear that the applicant is well regarded by his academic associates, by professors who had taught him in school and by members of the Bar who know him personally. We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside

source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group.

We have interrogated applicant at considerable length concerning his belief in the right to overthrow the government by force and violence. The applicant's views are perhaps best summed up in his own words which appear at p. 391 of the Record:

> "Almost everyone would agree there are times when a government should be overthrown by force. Ultimately, a citizen has to decide for himself when such a time comes—when the principles of the Declaration of Independence apply. The conscientious citizen reserves the right and duty to judge his government even as he takes the oath to support not that government but the Constitution. In fact, our Constitution can be said to have this right implicit in it, a right that protects the Constitution itself from subversion by a government that may be constitutional only in appearance. But, as I said when I first appeared before the full Committee on January 5, 1951, I do not think anyone would be justified at a time such as this, when the normal processes of government permit reasonable and peaceful change, to participate in action leading to the overthrow of government.
>
> "The right of revolution, as I understand it, is something that probably all the members of the Committee on Character and Fitness and of the Supreme Court of Illinois believe in. The Committee must realize that I would be no less reluctant than they to see this right of revolution exercised except in the most extreme circumstances. I trust that my position, and what I have contributed to its defence, indicate an abiding commitment to constitutional government."

In explaining his view the applicant relied on excerpts from the Declaration of Independence and Lincoln's inaugural address in 1861, and quotations from Thomas

Aquinas and Daniel Webster. (R. 158-159, 160, 390.) The applicant in answer to specific questions stated that he believed that the decision as to violent overthrow is essentially an individual one, but that the person making the choice should take into account the gravity of the provocation, the chance of his efforts succeeding, the general harm that his action may produce in the community, and whether his view is shared by any appreciable number of people. (R. 161-162.) The following exchange at one of the hearings sheds further light on the applicant's views in this regard:

"Q. It seems to me, the subjective versus the objective standard is quite important in connection with the questions we have been putting to you. If a group of Communists believe fervently, passionately, in the kind of system that is repugnant to us, if the standard is purely subjective, then they would have the right to overthrow the government as quickly as they could, would they not?

"A. No, that is not simply the question, I mean —I do not assume that any fool who decides the Government should be overthrown has the right to do so. I am not saying any group of men, fools or not fools, simply because they decide to overthrow the Government, have a right to do so. I am saying only that under certain circumstances there is a right to overthrow governments.

"Let me give you an example, a couple of examples, of recent date, of two unsuccessful revolutions which I think reflect the general American opinion, I won't say necessarily reflect mine, but the general American opinion. At the end of the war, toward the end of World War II, Hitler's generals made an attempt to overthrow him. You have all heard that. They were unsuccessful. Two years ago the Hungarians made an attempt to overthrow the government. They were unsuccessful. There is no doubt, I think, on the part of the general American population, that both of these

> attempts at revolution were legitimate in the sense that there was no principle about the right of revolution being violated here. The only problem that one would have, I suppose, in the general opinion would be in terms of the prudence, circumstances and consequences of the particular situations." (R. 166-167.)

The applicant has further stated to the Committee that he does not believe in the right to use force until peaceful means to redress an evil have been exhausted or appear futile. In relating his views with respect to overthrow to the political situation at the present time, applicant stated that he did not foresee any condition developing where revolution would be either desirable or valuable. (R. 170.)

A majority of the Committee has arrived at the conclusion that the views expressed by the applicant with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines. In view of this conclusion there is no need to consider in this connection either *Yates* v. *U. S.*, 354 U.S. 298, or *Konigsberg* v. *State Bar of California*, 353 U.S. 252. However, the *Konigsberg* case is necessarily considered in respect to the Committee's authority to ask certain questions of applicant, *infra*, pp. 12-13.

Apart from applicant's views as to the overthrow of the Government by force, certain other views expressed by him in these proceedings bear upon his attitude toward established authority and orderly governmental procedures. The Committee regards these views as relevant to an inquiry into the character and fitness of an applicant for admission to the bar.

One such other matter was the applicant's refusal to deny that circumstances might exist under which he would resist by force Federal or State officials seeking to enforce judgments or decrees in proceedings against him personally which had become final after full review by the highest court having jurisdiction. (R. 174-178, 237-240.) In his language, "I would not care to say there might not be instances where resistance to an officer of the law executing such a mandate might not be improper." (R. 176.) If admitted to the Bar and advising a client, he testified that he would not advise the client to resist by force or other similar means a final judgment or decree against the client, because in his opinion it was his duty to advise the client only "with respect to the legal system as it exists." (R. 177.) "In so far as I am a lawyer, I can tell him what his rights are under the accepted law * * * under the Canons of Ethics I would be derelict in my duty if I presume to do much more than that." (R. 239.) He denied that he was arrogating to himself rights or privileges which he would deny to others as "citizens." (R. 239-240.) He testified that "If, however, he (the client) were thereupon to approach me on some other basis, not as an attorney, there may be other advice I would be willing to give him." (R. 240.) He saw no inconsistency between such an opinion and the taking of an oath loyally to support the Constitution of the State of Illinois and the Constitution of the United States "without any reservation whatsoever." (R. 238.)

These views raise a serious question whether the attitude expressed by applicant toward final court determinations binding upon him and toward attempts to enforce them in accordance with the law is consistent with the oath required of attorneys in Illinois. Upon admission, an attorney is an officer of the courts, and one who

holds such views as the applicant's would fall within the condemnation expressed by the United States Supreme Court in the opinion signed by all the Justices in *Cooper* v. *Aaron*, 358 U.S. 1, 3 L. ed. 2d 5, and rendered on September 29, 1958:

> "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." (358 U.S. at p. 8.)

The further attitude expressed by applicant about advising others along the same subversive lines in his capacity as "citizen" as distinguished from his capacity as "attorney," also raises serious questions concerning his capacity to take the oath required of Illinois attorneys. Our Supreme Court in *In re Anastaplo*, 3 Ill. 2d 471, at p. 479, pointed out the importance of the fact in Bar application cases that attorneys hold positions of public trust which give them unique opportunities to impress their views and attitudes upon the public.

Perhaps the major issue presented to the Committee arose from the applicant's continued refusal to answer questions regarding possible Communist or other subversive affiliations. (R. 34, 35-37, 42-43, 46-47, 64, 65, 66, 94-97, 98-99, 105, 172-173, 336.) We felt justified in questioning applicant on such matters for the following reasons:

1. His refusal to respond to such questions in connection with his previous candidacy was undoubtedly the controlling reason why his application was denied by the Committee and was the pivotal point in the decision of the Supreme Court of Illinois affirming the Committee's action.

2. The Committee believes that its right to question the applicant on possible subversive affiliations has not been foreclosed by the *Konigsberg* decision. (*Konigsberg* v. *State Bar of California*, 353 U.S. 252.) This view is clearly

confirmed by the later decisions of the Supreme Court of the United States in *Lerner* v. *Casey*, 357 U.S. 468, 2 L. ed. 2d 1423, 78 S. Ct. 1311, and *Beilan* v. *Board of Education*, 357 U.S. 399, 2 L. ed. 2d 1414, 78 S. Ct. 1317, both of which expressly distinguished the *Konigsberg* case.

3. The Committee was convinced that the applicant's credibilty in connection with his answers to questions pertaining to the right of overthrow and the enforceability of judicial decrees should be tested by questioning him about possible subversive beliefs and activities.

4. The Committee believed that the applicant's ability to take the oath in good faith as an attorney of this State could be seriously questioned if he were an active and disciplined member of the Communist Party, especially at this juncture of history. (R. 115-116.) The Committee repeatedly warned the applicant that questions regarding Communist affiliation were viewed as important by the Committee members and that his failure to respond to them could adversely affect his application for admission to the bar. (R. 37, 116-117.) The Committee further reminded applicant that Congress, the Supreme Court of the United States and various legislatures and courts had classified the Communist Party as something separate and distinct from other political parties, and that in several jurisdictions the Party had been branded as a criminal conspiracy. (R. 115-117.) The Committee further stated that it might view a doctrinaire adherence to Communist goals as one thing, but active membership in the Party as quite another, and pointed out that until the applicant gave a candid response to the Committee's questions it could not formulate any judgment on applicant's basic loyalty. (R. 132.)

5. The Committee was directed to report to the Court on the applicant's activities since his original application was denied. The principal way in which the Committee

ascertains the activities in which a candidate has been engaged is by asking him questions.

Notwithstanding the foregoing, the applicant persistently refused to answer questions concerning Communist or other subversive affiliations. To explain his refusal he stated that such inquiries violated fundamental civil rights guaranteed to him by the First and Fourteenth Amendments to the Federal Constitution and by the Constitution of the State of Illinois. He did not rely upon any privilege against self-incrimination. He stated that his political beliefs were not a proper subject of inquiry by the Committee and bore no relevance to the question of his character and fitness.* He objected to any inquiry into such matters since the Committee, in his view, had laid no foundation for such an inquiry and had no evidence before it which would justify what he considered an intrusion into his private beliefs; he did not consider that his views with respect to overthrow of the government or disobedience of judicial decrees furnished any basis for any such questions. (R. 139, 155-157, 173.)

The applicant relies heavily on the *Konigsberg* case to support his refusal to answer questions concerning possible subversive affiliations and activities. We read the *Konigsberg* case to hold that a committee performing functions similar to our own is not entitled to draw an inference of bad moral character merely from the applicant's refusal to answer questions concerning membership in the Communist Party if such refusal is based on a good-faith belief that the United States Constitution prohibited the type of inquiry which the Committee was making and if the reviewing court can "find nothing in the record which indicates that his

* The applicant did not adopt this position at all stages of the hearing. He freely answered portions of the questionnaire dealing with constitutional doctrine and expatiated at length on his belief in violent overthrow.

position was not taken in good faith." (353 U.S. at p. 270.) The Court pointed out that the State Committee of Bar Examiners in California had at no point intimated to Konigsberg that he would be barred from the profession just because he refused to answer relevant inquiries or because he was obstructing the Committee. In the view of the Court the Committee's action was based principally upon inference which it drew from certain of applicant's past utterances, prior membership in the Communist Party and refusal to answer questions bearing upon present membership in the Party. (353 U.S. at p. 266.) The court held that considering the record as a whole such inferences were not permissible. The court expressly left open the question whether Konigsberg's constitutional objections to the Committee's questions were well founded and whether the Committee would be justified in insisting that its questions be answered. (353 U.S. at p. 270.)

The *Konigsberg* case is therefore not determinative in this proceeding. The United States Supreme Court in holding in that case that a committee like ours is not entitled to draw an inference of bad moral character merely from an applicant's refusal to answer questions concerning membership in the Communist Party, if such refusal is based upon a good faith belief that the United States Constitution prohibits the type of inquiry which the committee was making and if the Court could find nothing in the record to indicate bad faith on his part (353 U.S. 252, 270), did not hold that such a condition of a record affirmatively entitled an applicant to certification. Upon determination of the propriety of the questions and the lack of substance in the objections thereto the applicant would be entitled to another opportunity to answer, and if he persisted in his refusal to do so, the committee would not be acting inconsistently with *Konigsberg* in denying a certification.

Since the rehearing was granted herein, the United States Supreme Court decided on June 21, 1958, the cases of *Lerner* v. *Casey*, 357 U.S. 468, 2 L. ed. 2d 1423, 78 S. Ct. 1311, and *Beilan* v. *Board of Education of Philadelphia*, 357 U.S. 399, 2 L. ed. 2d 1414, 78 S. Ct. 1317, in which the Court clearly determined the propriety of questions of the kind asked the applicant in these proceedings. We called applicant's attention to these two most recent decisions and offered to him the opportunity to change his testimony in any manner he saw fit in the light of them. (Committee letter to applicant dated September 16, 1958.) He declined. (Applicant's letter to the Committee dated September 23, 1958.) His continued refusal to answer, evidenced by his reply of September 23, 1958, deprives him on this record of any argument of similarity between his status and that of Konigsberg and of any benefits from the decision in the *Konigsberg* case.

In *Lerner* v. *Casey, supra*, petitioner, a subway conductor in the New York City Transit System, was discharged by his employer under the New York Security Risk Law on the ground that his refusal, based upon the privilege against self incrimination guaranteed by the Fifth Amendment, to answer a question of his employer as to his membership in the Communist Party, showed that he was of doubtful trust and reliability. Petitioner sued in the New York State Court for reinstatement, attacking his discharge on various grounds, including lack of due process. The New York Supreme Court dismissed the suit and the Appellate Division and Court of Appeals both affirmed. On certiorari the United States Supreme Court also affirmed. Justice Harlan for the majority said:

> "In other words, we read the court's opinion as meaning that a finding of doubtful trust and reliability could justifiably be based on appellant's lack of frankness. *cf. Garner* v. *Board of Public Works*, 341 U.S. 716; *Beilan* v. *Board of Public Education, ante*, p. 399, de-

cided today, just as if he had refused to give any other information about himself which might be relevant to his employment. It was this lack of candor which provided the evidence of appellant's doubtful trust and reliability which under the New York statutory scheme constituted him a security risk. The Court of Appeals went on to reason that had appellant refused, without more, to answer the question, the finding of 'doubtful trust and reliability' would have undoubtedly been permissible, and that the basis for such a finding, in appellant's refusal to answer, was not destroyed by the claim of the Fifth Amendment privilege because the Commissioner was not required to accept that claim as an adequate explanation of the refusal.

"Accepting as we do, these premises of the state court's opinion, we find no constitutional block to its decision sustaining appellant's dismissal from employment • • •

"Nor, as the Court of Appeals stressed, was the claim of possible self-incrimination made the basis for an inference that appellant was a Communist and therefore unreliable. Hence we are not faced here with the question whether party membership may rationally be inferred from a refusal to answer a question directed to present membership where the refusal rests on the belief that an answer might incriminate, *cf. Adamson* v. *California*, 332 U.S. 46, or with the question whether membership in the Communist Party which might be 'innocent' can be relied upon as a ground for denial of state employment. *Cf. Wieman* v. *Updegraff*, *supra*; *Konigsberg* v. *State Bar of California*, 353 U.S. 252; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232.

"We think it scarcely debatable that had there been no claim of Fifth Amendment privilege, New York would have been constitutionally entitled to conclude from appellant's refusal to answer what must be conceded to have been a question relevant to the purposes of the statute and his employment, *cf. Garner* v. *Board of Public Works*, *supra*, that he was of doubtful trust and reliability. Such a conclusion is not 'so strained

as not to have a reasonable relation to the circumstances of life as we know them.' *Tot* v. *United States*, 319 U.S. 463, 468. This Court pointed out in *Garner* that a government employee can be required upon pain of dismissal to respond to inquiry probing into matters relevant to his employment, and that present membership in the Communist Party is such a matter. See also *Beilan* v. *Board of Public Education, supra.* Certainly it is not a controlling constitutional distinction that New York, rather than impose on employees, as in *Garner* and *Beilan*, an absolute duty to respond to permissible inquiry upon threat of dismissal for refusal, has in these proceedings held that an employee lacking in candor to his governmental employer evidences doubt as to his trust and reliability. Finally, unlike the situation involved in *Konigsberg* v. *State Bar of California, supra*, there is here no problem of inadequate notice as to the consequences of refusal to answer, for appellant was specifically notified that continued refusal might lead to his dismissal." (See 357 U.S. at pp. 476, 477-8.)

In *Beilan* v. *Board of Education of Philadelphia, supra*, petitioner, a public school teacher, was discharged by the local school board for "incompetency" under the Pennsylvania School Code, because of his refusal, continued after warning that failure to answer might lead to dismissal, to answer a question of his superintendent as to his membership in a Communist political association. On an administrative appeal, the superintendent sustained the local Board, but the County Court set aside the discharge. On appeal by the Board the Pennsylvania Supreme Court reversed and reinstated the discharge. On certiorari the United States Supreme Court affirmed. It held that due process was not violated by petitioner's discharge on the ground of "incompetency" evidenced by petitioner's refusal to answer the request of the superintendent for information as to the teacher's loyalty and as to his activities in certain subversive organizations, such refusal being

based upon the Fifth Amendment and other constitutional objections.

Justice Burton said:

"The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory 'incompetency' based on his refusal to answer the Superintendent's questions.

"By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher. • • •

"The question asked of petitioner by his Superintendent was relevant to the issue of petitioner's fitness and suitability to serve as a teacher • • • He made it clear that he would not answer any question of the same type as the one asked. Petitioner blocked from the beginning any inquiry into his Communist activities, however, relevant to his present loyalty. The Board based its dismissal upon petitioner's refusal to answer any inquiry about his relevant activities—not upon those activities themselves. It took care to charge petitioner with incompetency, and not with disloyalty. It found him insubordinate and lacking in frankness and candor—it made no finding as to his loyalty. • • •

"In the instant case, the Pennsylvania Supreme Court has held that 'incompetency' includes petitioner's 'deliberate and insubodinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness.' 386 Pa., at 91, 125 A. 2d, at 331. This interpretation is not inconsistent with the Federal Constitution. • • •

"Our recent decisions in *Slochower* v. *Board of Education,* 350 U.S. 551, and *Konigsberg* v. *State Bar of California,* 353 U.S. 252, are distinguishable. • • •

"In the *Konigsberg* case, *supra,* at 259-261, this Court stressed the fact that the action of the State

was not based on the mere refusal to answer relevant questions—rather, it was based on inferences impermissibly drawn from the refusal. In the instant case, no inferences at all were drawn from petitioner's refusal to answer. The Pennsylvania Supreme Court merely equated refusal to answer the employing Board's relevant questions with statutory 'incompetency'." (357 U.S. at pp. 404-406, 408-409.)

In the instant case, as in *Lerner* and *Beilan*, and unlike the situation in *Konigsberg*, no problem exists as to inadequate notice of the consequences of a refusal to answer; the applicant was specifically notified both by the Illinois Supreme Court in its opinion in 3 Ill. 2d 471, and by this Committee on rehearing that his continued refusal to answer might lead to the denial of his application. (R. 37, 116-117.)

In the course of the rehearing proceedings, the Committee conducted no independent investigation into applicant's character, reputation or activities. The Committee has no personnel nor other resources for any such investigation. For this very practical reason, the Committee has traditionally asserted the view that it cannot be expected to carry the burden of establishing, by independent investigation, whether or not an applicant possesses the requisite character and fitness for admission to the bar. It is rather for the applicant to establish, on his own behalf, that he possesses the necessary qualifications and it is for the Committee to test, by hearings and inquiry of the applicant, the worth of the evidence which the applicant proffers.

Because the applicant has refused to answer questions, we are unable to report whether his activities since the denial of his original application have included membership, office holding or other activities in the various organizations listed on the Attorney General list of subver-

sive organizations. We are also unable to report what his reputation is among the members of any organization with which he may be affiliated, since he has declined to inform us of his affiliations.

In the instant proceeding a majority of the Committee is of the opinion that applicant's petition for a license should be denied because he has failed to meet the burden which is on him of establishing his proper character and fitness. By refusing to answer questions deemed by the Committee to be relevant, he has thereby failed to establish that he has the necessary character and fitness and the Committee is therefore unable to certify him.

In this connection the Supreme Court in *In re Anastaplo*, 3 Ill. 2d 471, said (pp. 480, 483):

> "It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate.

• • • • •

> "We conclude that the committee's inquiry into petitioner's membership in the Communist Party was relevant to a determination of his good citizenship and his ability to take the oath of lawyer in good conscience, and that petitioner's constitutional rights were not infringed upon by such action. On the present record the petition must be denied."

A majority of the Committee continues to adhere to the views which were the basis of its decision on Anastaplo's prior application and which were expressed by the Supreme Court of Illinois in *In re Anastaplo,* 3 Ill. 2d 471 at 480-483, to the effect that it may properly interrogate an applicant as to membership in the Communist Party or in any other subversive group and that such inquiries are relevant to character and fitness. It believes that an applicant is not protected from such questions by any provisions of the State or Federal Constitutions. An applicant, of course, need not answer the question and cannot be punished for his refusal to respond. But his failure to reply, in our view, (i) obstructs the lawful processes of the Committee, (ii) prevents inquiry into subjects which bear intimately upon the issue of character and fitness, such as loyalty to our basic institutions, belief in representative government and *bona fides* of the attorney's oath and (iii) results in his failure to meet the burden of establishing that he possesses the good moral character and fitness to practice law, which are conditions to the granting of a license to practice law.

We draw no inference of disloyalty or subversion from applicant's continued refusal to answer questions concerning Communist or other subversive affiliations. We do, however, hold that there is a strong public interest in our being free to question applicants for admission to the bar on their adherence to our basic institutions and form of government and that such public interest in the character

of its attorneys overrides an applicant's private interest in keeping such views to himself. By failing to respond to this higher public interest we hold that the applicant has obstructed the proper functions of the Committee. By reason of applicant's own recalcitrance he has failed to demonstrate the good moral character and general fitness to practice law necessary for admission to the Bar. We cannot certify the applicant as worthy of the trust and confidence of the public when we do not know that he is so worthy and when he has prevented us from finding out.

Certain members of the Committee (who are included within the majority who believe that applicant's position for a license should be denied because he has failed to meet the burden which is on him of establishing his proper character and fitness) are of the further opinion that the record demonstrates affirmatively applicant's lack of the character and fitness necessary for admission to the Bar. They base their views upon (i) applicant's refusal, after the *Lerner* and *Beilan* decisions were called to his attention, to modify his refusal to answer the Committee's questions concerning Communist Party and other possible subversive affiliations and (ii) applicant's view that circumstances might exist under which he would not abide by, and might advise other citizens not to abide by, final decrees of a court of law and to resist by force their enforcement by appropriate legal process, when considered in connection with his views as to the overthrow of the government by force and violence.

It is the conclusion of the Committee that the application should be denied.

Respectfully submitted,

COMMITTEE ON CHARACTER AND FITNESS FOR THE FIRST APPELLATE COURT DISTRICT OF ILLINOIS.

The following members of the Committee join in the foregoing report:

D. Robert Thomas, *Chairman*,
Charles A. Bane,
Richmond M. Corbett,
Walter H. Moses,
John M. O'Connor, Jr.,
Francis J. Seiter,
Len Young Smith,
Robert A. Sprecher,
Edmund A. Stephan,
Jerome S. Weiss,
Horace A. Young.

[Minority Report]

We cannot join in the majority report.

The Supreme Court has asked us to hear evidence on three questions. The Committee is apparently unanimous in the conclusion that nothing in the answers to those three questions reflects adversely upon the applicant. The answers, as stated by the majority, are:

(1) "The views expressed by the applicant with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines."

(2) Since his original application was denied, he has been engaged primarily in academic life at the University of Chicago.

(3) He is "well regarded by academic associates, by professors who * * * taught him in school and by members of the Bar who know him personally."

The majority nevertheless finds reasons to deny admission. This is not because of any evidence derogatory to the applicant, for there is none. As the majority states and we agree:

"We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group."

In the face of all of this, how does the majority reach its result? It does so solely because of applicant's refusal to answer certain questions which are considered relevant, and because the burden of proof is on the applicant. The fact that the questions are relevant and the burden of proof on the applicant, does not relieve us of the obligation of considering the entire record and weighing all of the evidence. It does not give us the right to seek reasons to deny admission or to find those reasons in a refusal to answer under the circumstances of this case. In considering the entire record, applicant's refusal to answer is only one factor. It must be analyzed against the entire record and applicant's reasons for his refusal, and not used as an excuse, without more, for denying admission.

The record in this case, fairly read, reveals nothing reflecting adversely on applicant's moral character or reputation, or containing the slightest suggestion of disloyalty. This despite the fact that applicant has been before us at various times for seven and one-half years and has received considerable public attention.

The actual, limited extent of applicant's refusal to answer should be made clear. Applicant has answered fully all questions, including those concerning his political beliefs, except only such questions as were of such a specific nature and intent as—in the very answering—necessarily to reveal adherence or non-adherence to or membership or non-membership in a particular, identifiable organized political or religious group.

On this record, applicant's refusals can have significance only if they have made it impossible for us to determine the questions before us or have evidenced such a disrepect for this Committee, the Court and the community as to reflect on his character. Neither is the case here. His refusals have made it more difficult for us to discharge our duty, but they have not prevented us from doing so or relieved us of that duty.

The applicant did not set out to frustrate the work of the Committee by refusing both to answer and to explain the reasons for his refusal. Instead, he willingly gave us his views and was subjected to a most searching inquiry into his reasons which he explained repeatedly and in detail. His offense, as the majority sees it, is that he believes as a matter of principle, that we cannot constitutionally ask the questions he has refused to answer. He believes further that it is important that he refuse to answer. And he has adhered to these beliefs at a cost to date of seven and one-half years of his professional life.

The worst that can be said about applicant in this regard is that he may be wrong in his beliefs or in carrying them as far as he does. That some of us do not agree with the applicant and others would not be as persistent in our devotion to principle is of no relevance or significance. Nonconformity, if any there be, and devotion to principle

do not reflect adversely on character and are strange grounds for denying admission.

We believe that the applicant is sincere and conscientious in his beliefs, and that his refusal to compromise these beliefs in no way makes his unfit, immoral or of bad character. Honest error or unorthodoxy in political philosophy is not a ground for denial of a license to practice law.

When all is said and done, the majority denies admission because the applicant disagreed with the Committee by refusing to answer and in so doing, made the Committee's work more difficult. This is not a valid ground. We are not infallible and agreement with us is not and should not be a *sine qua non* to admission. And although the applicant's position made our task more difficult and time consuming, it did not prevent us from accomplishing it. We are here for the hard cases and an applicant who presents a hard case should not be punished for doing so, particularly where the difficulty arises from the applicant's adherence to conscientious scruples as to the meaning of the Constitution.

The majority finds support for its decision in an excursion into applicant's attitude toward possible future court orders affecting him, his clients or his friends. Apart from the fact that this goes beyond matters we were directed to examine, we find nothing in these philosophic observations which reflects adversely upon applicant's character or fitness, as we understood those terms.

We do not agree that because the applicant did not enlarge on his views as to the effect of later cases on the *Konigsberg* decision of the Supreme Court of the United States, this in any way detracts from the controlling importance of that case on this one, or, as is suggested,

deprives the applicant of the right to rely on that decision. It is still the law of the land, and despite all distinctions that may be made, the fact is that there was far more basis for the questions put to Konigsberg than those put to the applicant here. In *Konigsberg*, there was independent evidence of prior Communist membership and involvement. Here there is absolutely nothing. Yet in *Konigsberg* the applicant was upheld in his refusal to answer questions of the kind involved here.

In any event, assuming we have a right to ask such questions as applicant has refused to answer, we need not insist upon obtaining an anwer in response to our exercise of that right in a case where we have no foundation whatsoever for asking such questions except a desire to vindicate the status of the Committee. This is not an adversary proceeding where we sit to see, above all else, to the strict enforcement of our "rights" as against the applicants required to come before us.

It seems contrary to the proper purpose and spirit of this Committee to insist upon an inflexible rule that a refusal of an applicant to answer any question deemed lawful and relevant by the Committee automatically, and without more, forecloses the applicant from the favorable disposition of the Committee. It is, rather, our function, when faced with an applicant who shows some independence of spirit and thought, to display the same humanity, tolerance and common sense with which we pass upon the applications of all the hundreds of other more tractable applicants whom we continue to certify through the years. Accordingly, our function is fulfilled in such cases when we see to it that an applicant who refuses to answer any relevant question has produced the same strong evidence as has this applicant of his good reputation and activities

and has convinced the Committee, after hearings, that his refusal to answer is equally made with complete candor and in good faith and is not arbitrary, devious, or made for ulterior or irrational reasons.

In our view, the applicant has discharged the burden of proof that he has the requisite character and fitness. We know him well from protracted hearings and over-exposure to his view. He has demonstrated that he is a moral and patriotic American and that his views on the right of revolution are without significance. He is well thought of in the community and discharges important responsibilities. Despite the physical burdens of long hearings, applicant conducted himself in a gentlemanly manner and was temperate even in his criticism, particularly if, as he feels, he has been wronged by the Committee.

We now know the applicant is fit and of good character. On this record, it is pure sophistry to hold that his refusals to answer have prevented our determining his character and fitness. To deny admission under these circumstances would be a disservice to the Bar and a violation of the traditional concepts of fairness and due process. To do so under the shelter of burden of proof is a retreat to formalism we are unable to join

Our conclusion is that the applicant should be granted a certificate of satisfactory character and fitness.

The following members of the Committee join in the foregoing report:

JAMES P. CAREY, JR.,
J. R. CHRISTIANSON,
JAMES E. HASTINGS,
GEORGE N. LEIGHTON,
EDWARD I. ROTHSCHILD,
CALVIN P. SAWYIER.

IV.

OPINIONS OF THE SUPREME COURT OF ILLINOIS, 1959-1960 (AS SET FORTH IN ILLINOIS OFFICIAL REPORTER ADVANCE SHEETS, 18 Ill. 2d 182).

In re George Anastaplo, Petitioner.

Opinions filed November 18, 1959—Rehearing denied January 21, 1960.

Bristow, Schaefer, and Davis, JJ., dissenting.

Petition and Appeal from refusal of Committee on Character and Fitness to grant certificate.

George Anastaplo, of Chicago, petitioner, *pro se.*

Harry Kalven, Jr., and Roscoe T. Steffen, both of Chicago, *amici curiae.*

PER CURIAM: The present proceeding is a sequel to *In re Anastaplo,* 3 Ill. 2d 471. George Anastaplo passed the Illinois bar examination given in August of 1950. Thereafter, following extended hearings before the Committee on Character and Fitness for the First Appellate Court District, the committee, on June 6, 1951, advised Anastaplo that he had failed to prove such qualifications as to character and general fitness as, in the opinion of the committee, would justify his admission to the bar of Illinois.

Anastaplo filed in this court a "Petition and appeal from the refusal of the Committee on Character and Fitness * * * to sign a favorable certificate for admission to

the practice of law for the applicant and Motion to the Supreme Court of Illinois to provide for the admission of the applicant to the practice of law in the state of Illinois." For the reason that Anastaplo charged that the committee abused its discretion and that certain of his constitutional rights were infringed upon, we found that circumstances existed which should cause the matter to be set down for argument and opinion. (*In re Summers*, 325 U.S. 561, 80 L. ed. 1795, 65 S. Ct. 1307.) The matter was taken upon the record of the hearings before the Committee on Character and Fitness, the report of the committee, Anastaplo's brief and oral argument, briefs of two *amici curiae* and the suggestions of a one-time member of the committee in his behalf.

The crux of the earlier controversy centered upon Anastaplo's refusal to answer inquiries as to whether he was a member of the Communist Party or of any subversive organizations in a list compiled by the United States Department of Justice. When initially interrogated as to whether he was a member of the Communist Party Anastaplo answered that the question was an inquiry into his political beliefs and an "illegitimate question". He made like responses to similar questions in other parts of the record. Based upon these refusals, the committee, upon the basis of its opinion that a member of the Communist Party, because of such membership, might not be able in good faith to take the oath of attorney to support the Federal and State constitutions, thereupon directed questions to Anastaplo to elicit his views in what the committee deemed were pertinent areas of inquiry. Questioning of Anastaplo brought out his opinion that a member of the Communist Party, otherwise qualified, should be admitted to the practice of law and that he would see nothing contradictory or incompatible between adherence to tenets of that party and the taking of the attorney's

oath to support the constitutions. Anastaplo expressed his belief in the doctrine of revolution and the overthrow of government by force of arms, saying that he would embrace such doctrine if he could not agree with the existing government, or found it unsatisfactory, and felt that force of arms was the only means to attain the end desired. He also stated that such view would not be altered even though the existing government provided for peaceful and orderly means of change. In its report denying Anastaplo a certificate, the committee stated that the views and opinions expressed by Anastaplo on these matters were not the basis of its decision, but that such views increased the importance of his refusal to answer and made more necessary a complete answer upon the subject of membership in the Communist Party, so that the committee could better determine the ability of Anastaplo to take the oath of attorney in good conscience and his good citizenship.

In his appeal to this court, Anastaplo contended that the committee abused its discretion and exceeded its function by inquiring into what he described as his "political views," directly or indirectly. We rejected this contention and held that the committee's inquiry into Anastaplo's membership in the Communist Party was relevant to a determination of his good citizenship and his ability to take the oath of a lawyer in good conscience, and that his constitutional rights were not infringed upon. Accordingly, we concluded that "On the present record the petition must be denied." Anastaplo appealed to the United States Supreme Court, which treated the appeal as a petition for writ of *certiorari*, and denied the petition. (*In re Anastaplo* 348 U.S. 946, 99 L. ed. 740.) The Supreme Court of the United States also denied Anastaplo's motion for admission to the bar of that court in 349 U.S. 903 (1955), 99 L. ed. 1240.

Upon the authority of *Dennis v. United States,* 341 U.S. 494, 95 L. ed. 1137; *American Communications Ass'n, C.I.O.* v. *Douds,* 339 U.S. 382, 94 L. ed. 925, and *In re Summers,* 325 U.S. 561, we held that inquiries to applicant by the committee concerning his membership in the Communist Party did not violate either the first or the fourteenth amendment to the Federal constitution.

On June 25, 1957, subsequent to the decisions of the United States Supreme Court in *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 1 L. ed. 2d 819, 77 S. Ct. 722, *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 1 L. ed. 2d 796, and *Yates* v. *United States,* 354 U.S. 298, 1 L. ed. 2d 1356, 77 S. Ct. 1064, Anastaplo filed with the Committee on Character and Fitness a supplementary petition for rehearing of his application for admission to the bar. On July 2, 1957, the committee denied the petition. Thereafter on September 17, 1957, we entered the following order:

"In 1951 the Committee on Character and Fitness for the First Appellate Court District denied the application of George Anastaplo for admission to the bar of Illinois. This Court affirmed the action of the Committee, (*In re Anastaplo,* 3 Ill. 2d 471,) and the Supreme Court of the United States denied certiorari. (348 U.S. 946.)

"Subsequently the applicant filed with the Committee a petition for rehearing on the basis of certain decisions of the Supreme Court of the United States. The Committee denied this petition.

"The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California,* 353 U.S. 252, and *Yates* v. *United States,* 1 L. ed. 1356, 77 S. Ct. 1064.

Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.

"We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions."

In obedience to the directions of this court, the committee requested Anastaplo to file the questionnaire required by the committee of all applicants for admission to the bar. Anastaplo's answers, in large measure, supplemented the answers given to the questionnaire filed with the committee on October 26, 1950. Anastaplo also supplied attorney's affidavits and character affidavits from persons acquainted with him. In addition, the committee received communications from various individuals whose names were given as character references by Anastaplo and who furnished information concerning Anastaplo's moral character and general fitness to practice as an attorney.

The committee conducted five extended hearings, commencing February 28, 1958, and ending May 19, 1958. Anastaplo testified and argued at great lenth, as evidenced by approximately 420 pages of the record covering his oral testimony and argument. The record also contains law review articles, newspaper reprints, other exhibits, and letters from Anastaplo addressed to the committee. During the progress of the hearings, the committee repeatedly advised Anastaplo that he enjoyed the right to be represented by counsel and to call witnesses. He elected to submit his application solely upon his own testimony and argument.

During the interval between denial of his original application and the submission of his second application, Anastaplo had been employed the greater part of the time as an instructor and research assistant at the University of Chicago. The character affidavits and letters of reference supplied by Anastaplo disclose that he is well regarded by his academic associates, by professors who taught him in school and by lawyers who are personally acquainted with him. The committee says that it has not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation, and that it has received no information from any outside source which would cast any doubt on Anastaplo's loyalty or which would tend to connect him in any manner with any subversive group. The committee further advises us that it has conducted no independent investigation into Anastaplo's character, reputation or activities. For the very practical reason that the committee has no personnel or other resources for any such investigation, the committee states that it has traditionally asserted the view that it cannot be expected to carry the burden of establishing by independent investigation, whether an applicant possesses the requisite character and fitness for admission to the bar and that a duty devolves upon the applicant to establish that he possesses the necessary qualifications and that it is then the duty of the committee to test, by hearings and questioning of the applicant, the worth of the evidence which he proffers. We agree, and have held that the discretion exercised by the Committee on Character and Fitness will not ordinarily be reviewed. *In re Frank*, 293 Ill. 263.

The committee conducted an extensive inquiry into Anastaplo's belief in the right to overthrow the government by force and violence. His testimony in this regard does

not require narration since a majority of the committee concluded that while the views expressed by Anastaplo, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not and of themselves reveal any adherence to subversive doctrines. Accordingly, the committee quite properly decided that although, in the light of the quoted conclusion, there was no need to consider in this connection either *Yates* v. *United States*, 354 U.S. 298, or *Konigsberg* v. *State Bar of California*, 353 U.S. 252, the *Konigsberg* case necessarily required consideration, with respect to committee's authority to ask Anastaplo questions concerning Communist or other subversive affiliations and activities.

The committee regarded Anastaplo's views bearing upon his attitude toward established authority and orderly governmental procedures as relevant to an inquiry into his character and fitness for admission to the bar. First, Anastaplo declined to deny that circumstances might exist under which he would resist by force Federal or State officers seeking to enforce judgments or decrees in proceedings against him personally which had become final after full review by the highest court having jurisdiction. Anastaplo testified: "I would not care to say there might not be instances where resistance to an officer of the law executing such a mandate might not be improper." He testified, further, that if admitted to practice and advising a client, he would not advise the client to resist by force or other similar means a final judgment or decree against the client, because, in his opinion, it was his duty to advise the client only "with respect to the legal system as it exists. In so far as I am a lawyer, I can tell him what his rights are under the accepted law * * * under the Canons of

Ethics I would be derelict in my duty if I presume to do much more than that." Although disclaiming that he was arrogating to himself rights or privleges which he would deny to others as "citizens," he testified that "If, however, he [the client] were thereupon to approach me on some other basis, not as an attorney, there may be other advice I would be willing to give him." Anastaplo asserted that he saw no inconsistency between such an opinion and the taking of an oath to support the Federal and State constitutions "without any reservations whatsoever."

The foregoing views, according to the committee's report, raise a serious question whether the attitude expressed by Anastaplo toward final court determinations binding upon himself and toward attempts to enforce them conformably to the law is consistent with the oath required of attorneys in this State. An attorney is an officer of the courts. (*In re Day*, 181 Ill. 73.) In *Cooper* v. *Aaron*, 358 U.S. 1, 3 L. ed. 2d 5, the United States Supreme Court said, at page 8: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."

The committee's report also suggests that Anastaplo's attitude with respect to advising others along the same subversive lines in his capacity as "citizen" in contradistinction to his capacity as "attorney" raises additional serious questions concerning his capacity to take the oath required of attorneys in this State. See: *In re Anastaplo*, 3 Ill. 2d 471, at page 479.

The major issue presented to the committee arose from the applicant's continued refusal to answer questions regarding possible Communist or other subversive affiliations. In our first opinion in this case, we said in 3 Ill. 2d 471, at page 478:

"Neither the committee nor this court, faced with the question of whether membership in the Communist Party is relevant to a determination of petitioner's good citizenship and his ability to take the oath of lawyer in good conscience, need be oblivious to the existence of that party and its established conspiratorial nature, nor to the view in which it is held by the people of this country. Aside from the fact that membership in an organization advocating the forceful overthrow of our government would give rise to questions concerning the sincerity of an applicant's oath of loyalty, it is proper to consider that the lawyer, as an officer of the court, holds a position of public trust, or at least of semipublic trust. • • • While technically not a governmental employee, a lawyer meets on common ground with one so employed, in that loyalty to the constitution is an inalienable condition to their service. In either case, Communist Party membership or communst activity is totally incompatible with such loyalty.

"It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His

refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate."

We reaffirm our adherence to the foregoing views.

In *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), 97 L. ed. 842, the petitioner, who had been inducted under the Doctor's Draft Act, brought *habeas corpus* proceedings for his discharge from Army because he had not been assigned to the specialized duties nor given the commissioned rank to which he claimed to be entitled by the circumstances of his induction. The petitioner had refused to answer the question "Are you now or have you ever been a member of the Communist Party, U.S.A., or any Communist Organization?" in connection with his application for a commission. In affirming the denial of the writ, the Supreme Court (Justice Jackson) said at page 91: "Could this Court, whatever power it might have in the matter, rationally hold that the President must, or even ought to, issue the certificate to one who will not answer whether he is a member of the Communist Party? It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertion by Communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question 'No'."

In *Lerner* v. *Casey*, 357 U.S. 468 (1958), 2 L. ed. 2d 1423, petitioner, a subway conductor in the New York City

Transit System, was discharged by his employer under the New York Security Risk Law on the ground that his refusal, based upon the privilege against self incrimination guaranteed by the fifth amendment, to answer a question of his employer as to his membership in the Communist Party, showed that he was of doubtful trust and reliability. Petitioner sued in the New York State court for reinstatement, attacking his discharge on various grounds, including lack of due process. The New York supreme court dismissed the suit and the Appellate Division and Court of Appeals both affirmed. On *certiorari*, the United States Supreme Court also affirmed. Justice Harlan for the majority said, at pages 476-8:

"In other words, we read the court's opinion as meaning that a finding of doubtful trust and reliability could justifiably be based on appellant's lack of frankness, *cf. Garner* v. *Board of Public Works*, 341 U.S. 716; *Beilan* v. *Board of Public Education, ante*, p. 399, decided today, just as if he had refused to give any other information about himself which might be relevant to his employment. It was this lack of candor which provided the evidence of appellant's doubtful trust and reliability which under the New York statutory scheme constituted him a security risk. The Court of Appeals went on to reason that had appellant refused, without more, to answer the question, the finding of 'doubtful trust and reliability' would have undoubtedly been permissible, and that the basis for such a finding, in appellant's refusal to answer, was not destroyed by the claim of the Fifth Amendment privilege because the Commissioner was not required to accept that claim as an adequate explanation of the refusal.

"Accepting, as we do, these premises of the state court's opinion, we find no constitutional block to its decision sustaining appellant's dismissal from employment . . .

Nor, as the Court of Appeals stressed, was the claim of possible self-incrimination made the basis for an inference that appellant was a Communist and therefore unreliable. Hence we are not faced here with the question whether party membership may rationally be inferred from a refusal to answer a question directed to present membership where the refusal rests on the belief that an answer might incriminate, *cf. Adamson* v. *California*, 332 U.S. 46, or with the question whether membership in the Communist Party which might be 'innocent' can be relied upon as a ground for denial of state employment. *Cf. Wieman* v. *Updegraff*, *supra*; *Konigsberg* v. *State Bar of California*, 353 U.S. 252; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232.

"We think it scarcely debatable that had there been no claim of Fifth Amendment privilege, New York would have been constitutionally entitled to conclude from appellant's refusal to answer what must be conceded to have been a question relevant to the purposes of the statute and his employment, *cf. Garner* v. *Board of Public Works*, *supra*, that he was of doubtful trust and reliability. Such a conclusion is not 'so strained as not have a reasonable relation to the circumstances of life as we know them.' *Tot* v. *United States*, 319 U.S. 463, 468. This Court pointed out in *Garner* that a government employee can be required upon pain of dismissal to respond to inquiry probing into matters relevant to his employment, and that present membership in the Communist Party is such a matter. See also *Beilan* v. *Board of Public Education*, *supra*. Certainly it is not a controlling constitutional distinction that New York, rather than impose on employees, as in *Garner* and *Beilan*, an absolute duty to respond to permissible inquiry upon threat of dismissal for refusal, has in these proceedings held that an employee lacking in candor to his governmental employer evidences doubt as to his trust and

reliability. Finally, unlike the situation involved in *Konigsberg* v. *State Bar of California, supra,* there is here no problem of inadequate notice as to the consequences of refusal to answer, for appellant was specifically notified that continued refusal might lead to his dismissal."

In *Beilan* v. *Board of Public Education,* 357 U.S. 399, 2 L. ed. 2d 1414, petitioner, a public school teacher, was discharged by the local school board for "incompetency" under the Pennsylvania School Code because of his refusal, continued after warning that failure to answer might lead to dismissal, to answer a question of his superintendent as to his membership in a Communist political association. On an administrative appeal, the superintendent sustained the local board, but the county court set aside the discharge. On the appeal by the board the Pennsylvania Supreme Court reversed and reinstated the discharge. On *certiorari,* the United States Supreme Court affirmed. It held that due process was not violated by petitioner's discharge on the ground of "incompetency" evidenced by petitioner's refusal to answer the request of the superintendent for information as to the teacher's loyalty and as to his activities in certain subversive organizations, such refusal being based upon the fifth amendment and other constitutional objections.

Justice Burton, who had voted with the majority in the *Konigsberg case,* said, at pages 404-6, 408-9: "The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory 'incompetency' based on his refusal to answer the Superintendent's questions.

"By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of

frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher.

• • •

"The question asked of petitioner by his Superintendent was relevant to the issue of petitioner's fitness and suitability to serve as a teacher. • • • He made it clear that he would not answer any question of the same type as the one asked. Petitioner blocked from the beginning any inquiry into his Communist activities, however relevant to his present loyalty. The Board based its dismissal upon petitioner's refusal to answer any inquiry about his relevant activities—not upon those activities themselves. It took care to charge petitioner with incompetency, and not with disloyalty. It found him insubordinate and lacking in frankness and candor—it made no finding as to his loyalty.

• • •

"In the instant case, the Pennsylvania Supreme Court has held that 'incompetency' includes petitioner's 'deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness.' 386 Pa. at 91, 125 A. 2d at 331. This interpretation is not inconsistent with the Federal Constitution.

• • •

"Our recent decisions in *Slochower* v. *Board of Higher Education*, 350 U.S. 551, and *Konigsberg* v. *State Bar of California*, 353 U.S. 252, are distinguishable. • • •

"In the *Konigsberg case, supra*, at 259-261, this Court stressed the fact that the action of the State was not based on the mere refusal to answer revelant questions—rather, it was based on inferences impermissibly drawn from the refusal. In the instant case, no inferences at all were drawn

from petitioner's refusal to answer. The Pennsylvania Supreme Court merely equated refusal to answer the employing Board's relevant questions with statutory 'incompetency.' "

In the instant case, as in *Lerner* and *Beilan*, and unlike the situation in *Konigsberg*, no problem exists as to inadequate notice of the consequences of a refusal to answer; the applicant was specifically notified both by the Illinois Supreme Court in its opinion in 3 Ill. 2d 471, and by the committee on rehearing that his continued refusal to answer might lead to the denial of his application.

In *Barenblatt* v. *United States*, 3 L. ed. 2d 1115, 79 S. Ct. 1081 (1959), the petitioner was convicted of contempt by the district court for refusal to answer certain questions before a subcommittee of the Committee on Un-American Activities of the House of Representatives. Two of the questions were "Are you now a member of the Communist Party?" and "Have you ever been a member of the Communist Party?" The Court of Appeals affirmed but the Supreme Court vacated the judgment and remanded the case to the Court of Appeals for reconsideration in light of *Watkins* v. *United States*, 354 U.S. 178 (1957), 1 L. ed. 2d 1273. The Courts of Appeals reaffirmed the conviction and the Supreme Court affirmed. Justice Harlan said at pages 1129-1131 (L. ed.):

"That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court, and it is sufficient to say, without particularization, that Congress has enacted or considered in this field a wide range of legislative measures, not a few

of which have stemmed from recommendations of the very Committee whose actions have been drawn in question here. In the last analysis this power rests on the right of self-preservation, 'the ultimate value of any society,' *Dennis* v. *United States*, 341 U.S. 494, 95 L. ed. 1137. Justification for its exercise in turn rests on the long and widely accepted views that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress.

"On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. See, *e.g.*, *Carlson* v. *Landon*, 342 U.S. 523, 96 L. ed. 547, 72 S. Ct. 525;; *Galvan* v. *Press*, 347 U.S. 522, 98 L. ed. 911, 74 St. Ct. 737. On the same premises this Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. See *Gerende* v. *Board of Supervisors of Elections*, 341 U.S. 56, 95 L. ed. 745, 71 S. Ct. 565; *Garner* v. *Board of Public Works*, 341 U.S. 716, 95 L. ed. 1317, 71 S. Ct. 909. See also *Beilan* v. *Board of Public Education*, 357 U.S. 399, 2 L. ed. 2d 1414, 78 S. Ct. 1317; *Lerner* v. *Casey*, 357 U.S. 468, 2 L. ed. 2d 1423, 78 S. Ct. 1311; *Adler* v. *Board of Education*, 342 U.S. 485, 96 L. ed. 517, 72 S. Ct. 380. Similarity, in other areas, this Court has recognized the close nexus between the Communist Party and violent overthrow of government. See *Dennis* v. *United*

States, supra; American Communication Ass'n, C.I.O. v. *Douds, supra.* To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II, affairs to which Judge Learned Hand gave vivid expression in his opinion in *United States* v. *Dennis,* 2 Cir.) 183 F. 2d 201, 213, and to the vast burdens which these conditions have entailed for the entire Nation.

* * *

"* * * An investigation of advocacy of or preparation for overthrow certainly embraces the right to identify a witness as a member of the Communist Party, see *Barsky* v. *United States,* 83 App. D.C. 127, 167 F. 2d 241, and to inquire into the various manifestations of the Party's tenets. The strict requirements of a prosecution under the Smith Act, see *Dennis* v. *United States, supra,* and *Yates* v. *United States,* 354 U.S. 298, 1 L. ed. 1356, 77 S. Ct. 1064, are not the measure of the permissible scope of a congressional investigation into 'overthrow,' for of necessity the investigatory process must proceed step by step."

In *Uphaus* v. *Wyman,* 3 L. ed. 2d 1090, 79 S. Ct. 1040 (1959), the appellant, the executive director of World Fellowship, Inc., was adjudged in contempt by a New Hampshire county court for refusal to produce in connection with a State subversive inquiry a list of the guests attending the organization's summer camp. The New Hampshire Supreme Court affirmed the judgment and the Supreme Court of the United States also affirmed. Justice Clark said at pages 1096-1098 (L. ed.): "The interest of the guests at World Fellowship in their associational

privacy having been asserted, we have for decision the federal question of whether the public interests overbalance these conflicting private ones. Whether there was 'justification' for the production order turns on the 'substantiality' of New Hampshire's interest in obtaining the identity of the guests when weighed against the individual interests which the appellant asserts. *National Association for Advancement of Colored People* v. *State of Alabama,* 357 U.S. 449 (1958). * * * The Attorney General sought to learn if subversive persons were in the State because of the legislative determination that such persons, statutorily defined with a view toward the Communist Party, posed a serious threat to the security of the State. The investigation was, therefore, undertaken in the interest of self-preservation, 'the ultimate value of any society.' *Dennis* v. *United States,* (1951), 341 U.S. 494, 509, 95 L. ed. 1137, 71 S. Ct. 857. This governmental interest outweighs individual rights in an associational privacy which, however real in other circumstances, *cf. National Association for Advancement of Colored People* v. *State of Alabama, supra,* were here tenuous at best."

In our earlier opinion, (3 Ill. 2d 471,) we said at page 482: "Further, in regard to the contention that petitioner's right of free speech has been infringed upon by the inquiries of the committee, we may also consider the established principle of this jurisdiction that the practice of law is a privilege, not a right. In granting that privilege we may impose any reasonable conditions within our control and if an applicant does not choose to abide by such conditions he is free to retain his beliefs and go elsewhere. Among other things, the granting of the privilege to practice law in this State is conditioned upon proof by the applicant of his good moral character, of his general fitness to practice law and of his good citizenship, and upon the taking of an oath to support the State and Federal con-

stitutions. Such conditions are almost universal in this land and, so far as we can ascertain, their reasonableness has never been attacked. When an applicant, knowing of such conditions, applies for admission and signifies that he will take the oath of lawyer, we think it inconsistent with the privilege he seeks that he should be permitted to defeat pertinent inquiry into his ability to fulfill such conditions by any claim of the right of speech."

In the case of *In re Isserman*, 345 U.S. 286 (1953), 97 L. ed. 1013, the respondent was one of the attorneys for the defendants whose convictions were affirmed in *Dennis* v. *United States*, 341 U.S. 494 (1951). At the conclusion of the trial he was convicted for contempt of court, which was affirmed in *Sacher* v. *United States*, 343 U.S. 1 (1952). The Supreme Court of New Jersey disbarred the respondent, and the Supreme Court of the United States then issued a rule for the respondent to show good cause why he should not be disbarred in that court. In disbarring the respondent, the Supreme Court (Chief Justice Vinson) said at page 289: "Our rule puts the burden upon respondent to show good cause why he should not be disbarred. * * * There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice. That to the individual disbarred there is a loss of status is incidental to the purpose of the Court and cannot deter the Court from its duty to strike from its rolls one who has engaged in conduct inconsistent with the standard expected of officers of the Court."

The Committee on Character and Fitness drew no inference of disloyalty or subversion from Anastaplo's consistent refusals to answer questions concerning Communist or other subversive affiliations. We agree with the committee that a strong public interest supports the interrogation of applicants for admission to the bar on their adher-

ence to our basic institutions and form of government and that this public interest in the character of its attorneys overrides an applicant's purely personal interest in keeping such views to himself. In the light of *Barenblatt* v. *United States*, 3 L. ed. 2d 1115, 79 S. Ct. 1081, alone, the relevancy of an inquiry as to whether an applicant for admission to the bar is a member of the Communist Party is no longer debatable. Decisions of the United States Supreme Court since *In re Anastaplo*, 3 Ill. 2d 471, fortify our earlier conclusion that a determination as to whether an applicant can in good conscience take the attorney's oath to support and defend the constitutions of the United States and the State of Illinois is impossible where he refuses to state whether he is a member of a group dedicated to the overthrow of the government of the United States by force and violence. By failing to respond to the higher public interest, Anastaplo obstructed the proper functions of the Committee on Character and Fitness. By virtue of his own recalcitrance he failed to demonstrate the good moral character and general fitness to practice law necessary for admission to the bar of this State.

The report of the Committee on Character and Fitness is confirmed.

Report confirmed.

Mr. JUSTICE BRISTOW, dissenting:*

I must dissent from the majority opinion on the ground that it deprives the applicant of due process of law under the Federal constitution by denying him admission to the bar in the absence of a scintilla of derogatory evidence to mar the substantial record of his good moral character, and

*Corrections of the Advance Sheets version of this dissenting opinion have been supplied by Mr. Justice Bristow. Cf. 163 N.E. 2d 429 Advance Sheets.

is in direct conflict with the decisions of the United States Supreme Court in *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 1 L. ed. 2d 810, and *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 1 L. ed. 2d 796.

The constitutional issue in this cause is not, as the *per curiam* opinion implies, whether the committee's questions on political or subversive affiliation were constitutional. The issue is rather, even if Anastaplo were wrong about the impropriety of such questions, whether his good-faith refusal to answer them, on the ground that the first and fourteenth amendments of the Federal constitution barred such inquiry, is a sufficient basis for denying him admission to the bar for failure to establish good moral character. That issue has been determined by the United States Supreme Court in the *Konigsberg* case, which the majority opinion refuses to follow.

Before considering that case or the authorities cited in the majority opinion, I must point out that while I am no less sensitive to the very real danger of Communist infiltration in the bar than is the *per curiam* opinion, I do not believe, as the majority opinion does, that an indictment of the Communist Party, however justified, or a reiteration of the lawyer's obligation to his country, or a warning that the nation must have power to protect itself, however appropriate, is any substitute for evidence against George Anastaplo's moral character. Moreover, I am constrained to call attention to the distorted picture of applicant, which the *per curiam* opinion endeavors to create.

The opinion at the outset tries to create the taint that applicant believes in a subversive political philosophy by quoting isolated statements out of context from the 1951 record—which is not even before this court—and by completely omitting applicant's statements respecting the right

to revolution in the present record. The opinion omits applicant's statement that his views on the right to revolution are, and have been, the same as those embodied in the Declaration of Independence and advanced by Lincoln and Daniel Webster in writings set forth in the present record. Nor does the opinion refer to applicant's unequivocal statement in the record: "But as I said when I first appeared before the full committee on January 5, 1951, I do not think anyone would be justified at a time such as this, when the normal processes of government permit reasonable and peaceful change, to participate in action leading to the overthrow of the government. The Committee must realize that I would be no less reluctant than they to see the right of revolution exercised, except in most extreme circumstances. I trust that my position and what I have contributed to its defense indicate an abiding commitment to constitutional government."

Instead, the opinion dismisses such testimony summarily with the statement that applicant's views do not now require narration because the committee did not find them objectionable, after leaving the taint from the isolated statements in the prior record.

The *per curiam* opinion clutches at straws by even referring to Anastaplo's views on resistance to a court decree as grounds for denying him admission to the bar, in view of his unequivocal statement that he would resist a court decree only under circumstances where constitutional government has been subverted, so that resistance would really be aimed at restoring the constitution and supporting it without reservation. Surely this is no war against the constitution, as the *per curiam* opinion implies. Even the minority report of the committee frankly regarded this matter of resistance to a court decree as a far fetched ground for excluding applicant, particularly in view of his own exemplary conduct during the course of his bar ad-

mission litigation these past 9 years, which is the best evidence of his reaction to court orders.

I could not, within the confines of this dissenting opinion, summarize the hours of questions, answers and arguments revealing all of applicant's views. I have already alluded to some of them. However, since the majority opinion has sought to give a distorted picture of those views and of the nature of the proceedings, I wish to call attention to some of the questions and answers which cast light on this matter.

At the very first session, applicant was asked whether he was a member of any nationality organization. After he replied that he was not, he was asked whether he was a member of a nationality organization that had been designated by the Attorney General as subversive. Applicant refused to answer, explaining that when the question designated the organization as subversive, its intent was to elicit information about political affiliations. To such inquiry he must object on the ground that it infringed his rights under the first and fourteenth amendments, was beyond the province of a Character and Fitness Committee, and, more particularly, was outside of the terms of the Supreme Court rehearing order of 1957. He pointed out that if the committee was interested in eliciting information, it already had the answer to this question, since he had just stated that he was not a member of *any* nationality organization.

In response to the query, "Are you refusing for fear that if you did answer one way or another we might be able to check and find that you have committed perjury," applicant stated, "That is not my fear." He added, "With reference to perjury, it is irrelevant to this situation as is any reference to the Fifth Amendment."

He explained that he would refuse to answer on constitutional principles all questions relating to political affiliations, including those with the Democratic and Republican parties, as well as with any and all organizations on the Attorney General's list, including the Communist Party, the K.K.K., or the Silver Shirts of America, even if the answers reflected favorably on him. He stated: "I would rather be rejected by this Committee if this question becomes crucial by taking a firm position on constitutional principles, than be accepted by seeming to take it, and at the same time taking a back door."

Applicant added the observation that the committee, in pursuing this line of inquiry, was asking questions the answers to which it had very little doubt about. In support of that assertion he referred to a statement in a document, identified under oath as accurate, apparently reporting the admission of a Justice of this Court that at the last hearing "no one of the Committee or the Court ever thought that he [Anastaplo] was a Communist." Applicant also reiterated that the committee had nothing in the record originally, or during the course of the intervening 7 or 8 years, to justify this line of inquiry or to indicate that he would not take his oath seriously and in good faith. In this connection, a spokesman for the committee admitted: "No one has stated to this committee that you are or have ever been a Communist, or a member of the Ku Klux Klan, or a member of the organizations listed as subversive on the Attorney General's list."

Consequently, applicant moved that the committee desist from this line of inquiry, which was beyond the Supreme Court mandate, was neither relevant, nor for the alleged purpose of inquiring into areas it might otherwise be uncertain about, was being pursued only to induce him to assert his constitutional objections, and was thereby highly prejudicial. The committee denied his motion.

In response to the admonition by the committee that his refusal to answer the question whether he was a member of the Communist Party "may have serious consequences," Anastaplo replied, "Am I ineligible because I take the dissents of certain members of the Supreme Court seriously?" He then pointed out that in the *Konigsberg* and *Schware* cases (353 U.S. 252; 353 U.S. 232) even the majority of the court supported his interpretation of the law, whereby refusal to answer the questions on the grounds asserted by him would, at most, constitute merely one piece of evidence in the record. He argued that such refusal would not necessarily be adverse nor warrant rejection. His position is best stated in his letter to the committee on March 27, 1958, which is included in the record:

> "Is one not obliged in the interest of good advocacy and judicial integrity to resist strenuously, even at the risk of incurring official displeasure, unconstitutional disregard of the rule of law? May not, in fact, such resistance reflect the best traditions of the bar, and thereby provide the best evidence that a character committee can desire with respect to an applicant's qualification for the practice of law?"

This precise point, that refusal to answer may be indicative of good character, is evident in this record. Applicant courageously and properly refused to answer the unconstitutional religious inquiries—*i.e.*, whether he believed in a Deity, or eternal punishment as a sanction for his oath. He stated that he would respect his duties as an attorney, with or without the oath, but did not care to speak about whether there were any religious sanctions, such as the fear of eternal punishment, back of his oath, or whether he believed in a Deity, on the grounds that the constitution barred such inquiries. This line of inquiry, persisted in since the very first session, and apparently based upon an 1856 decision, was later admitted by the committee to be improper and unconstitutional since 1870.

The *per curiam* opinion completely overlooked this portion of the record. I cannot follow that course, particularly since the record shows that applicant's refusal to answer these religious questions had so prejudiced the committee that one member stated that the refusal to answer had a "substantial bearing on his [applicant's] fitness to practice law." Such prejudice could hardly be wiped out by the statement of the chairman that these improper questions would not be taken into consideration.

The majority opinion also ignored applicant's argument in support of his refusal to answer the political affiliations questions, that the avowed Communist of the type the committee would want to ferret out of the profession as a menace to our government would have little difficulty in compromising constitutional principles and in giving the desired answers, and that the approach of the committee was effective only in discouraging applicants to stand by principles. I find merit in this argument.

The majority opinion makes no reference to applicant's closing arguments, which I find indicative of his views on our form of government, and the obligation of the lawyer to that government. Here, the applicant first reviewed this cause from its inception, pointing out that the original committee action in 1951 reflected the tenor of the times, when groups tried to outdo each other in hunting possible subversives, and explaining that the Illinois Supreme Court was misled into sustaining the committee's action by the suppression and distortion of the sequence of evidence. He reiterated the lack of foundation for the affiliation inquires, the legal arguments supporting his position, with particular emphasis on the *Konigsberg* record and decision. Finally, he emphasized the basic tenets of our republican government and the obligations of the bar to preserve them, and to lead the nation by precept and example.

In addition to these significant omissions in the *per curiam* opinion, which give a completely misleading impression of the applicant and the hearings, I must also take issue with the scant attention paid by the *per curiam* opinion to the character affidavits and letters of reference submitted to the committee. In my opinion the court should have given considerable weight to these affidavits, as did the United States Supreme Court in the *Schware* and *Konigsberg* cases (353 U.S. 232, 244, 1 L. ed. 2d 810; 353 U.S. 252, 265, 1 L. ed. 2d 796), particularly since they were submitted at the committee's request, on their forms, and were presented by persons of stature in the legal profession and other fields, who do not bandy about tributes such as were paid to applicant's honesty, integrity, general conduct and character traits qualifying him for the practice of law.

The affiants included Professor Alexander Meiklejohn, Professor Emeritus of the University of Wisconsin and past president of Amherst College, in whose name the American Association of University Professors established an Annual Award; Professor Malcolm Sharp, professor of law at the University of Chicago; Professor Roscoe Steffen, professor of law at Yale University and the University of Chicago, and advocate for the Department of Justice before the United States Supreme Court; Professor Yves Simon, formerly of Notre Dame and currently professor of philosophy at the University of Chicago, and recipient of the Spellman-Aquinas Medal for excellence in philosophy from the American Catholic Philosophical Association; Richard Weaver of the University of Chicago faculty and editorial writer for Modern Age, a conservative review. Other affiants include a former chairman of the Character and Fitness Committee; a lawyer who authored a text on the canons of ethics, and contributed substantially to bar

association work; a minister, the Dean of University College, and others who supervised Anastaplo's work. These affiants praised applicant's character unstintingly. We note some of the comments, which are representative of the tenor of the affidavits.

Professor Meiklejohn attested: "He [Anastaplo] is intellectually able, a hard, thorough student and moved by high devotion to the principles of freedom and justice * * * unqualifiedly worthy of the highest trust and confidence."

Professor Sharp attested: "His [Anastaplo's] reputation in these respects [for honesty, integrity and general conduct] is of the highest. No question has ever been raised about his honesty or his integrity, and his general conduct, characterized by friendliness, quiet independence, industry and courage, is reflected in his reputation * * *. His fellow students respect him. He is in every way among the very best of the students I have seen in my teaching experience."

Richard Weaver attested to applicant's unusual intelligence, fairness and personal modesty, and patriotism in the old-fashioned sense, as well as his sympathetic understanding of affiant's conservatism. "Everything I know about applicant leaves me feeling that he is an unusually intelligent, balanced and helpful American citizen."

Professor Yves Simon characterized Anastaplo by "intelligence, conscientiousness, sincerity and integrity," and concluded, "I consider Anastaplo to be a young man of the most distinguished and lofty moral character."

Dean Donohue of University College, where Anastaplo taught, refers to his honesty as "admirable and unequivocal," and to his integrity as "perhaps even over rigid for our culture."

Robert Coughlan, Anastaplo's supervisor at the Industrial Relations Center, attested: "I would recommend him without the slightest reservation for any position involving the highest and most sacred trust. If admitted to the American Bar, he could do nothing that would not reflect glory on that institution."

Attorney William Trumbull attested: "Affiant has found applicant to exhibit in all respects an exceptionally high degree of honor and integrity and profound loyalty to his country, its form of government and its ideals and to enjoy an excellent reputation for good moral character."

In addition to this evidence, I believe that a review of the career of George Anastaplo will also cast light upon his character and fitness.

This record shows that George Anastaplo was born in 1925, in St. Louis, Missouri, where he secured his elementary school education; that the family moved to Carterville, Illinois, where he attended high school; and that he attended the University of Illinois for some three months before enlisting in the Air Corps, where he attained the rank of Second Lieutenant, and served some 38 months in the Pacific, European and North African theatres of war. He came out of service in February, 1947, and was attached to the Inactive Reserves until his resignation some few years ago. He was accepted by the University of Chicago for the Fall Term of 1947, and during 6 of the intervening months he attended Southern Illinois University. He secured an A.B. degree from the University of Chicago one year later, after carrying a double schedule of classes, and then attended law school. He passed the bar examination in the fall of 1950, and was graduated from law school in 1951.

After this court denied his application for admission to the bar, he, his wife, whom he married in 1949, and their child had a brief trip to Paris, where he enrolled at the Sorbonne. From there they went to Dallas, Texas, where his wife's family resided. During their sojourn there, Anastaplo took a course in oil-and-gas law. At the end of 1951 the family returned to Chicago, and Anastaplo began working at the Industrial Relations Center on the preparation of materials for a training course for management personnel. He remained at that job until August of 1957, and also taught an adult education course at the University College of the University of Chicago. More recently he has been devoting half time to teaching at the College, and half time to an administrative post there, and is working toward his Doctor of Philosophy degree on a phase of constitutional law.

Other activities since the original character hearing in 1951 include a 6-week management study of the Socony Mobil Oil Company, in New York in the summer of 1956, pursuant to a business fellowship from the Foundation for Economic Education; and serving as an election judge at the behest of both of the major political parties, in different elections. In this connection, it may be noted that the critical question of some committee members respecting this activity, when Anastaplo refused to identify his party affiliations on constitutional grounds, prompted him to inquire of the county judge whether he had unwittingly breached any rules by serving the Republican and Democratic parties at different elections, and whether something more than *pro forma* identification with a political party might be necessary to serve as an election judge. He also offered to return any payment received for his services. There was, however, no breach of any rules, nor any repayment of earnings necessary.

In the light of all the foregoing evidence appearing in the current record of over 400 pages, compiled pursuant to a searching examination of applicant by the committee during some six sessions of several hours each and extended from February to May of 1958, it is not clear to me just how the majority of the committee or the *per curiam* opinion could conclude that applicant's refusal to reply to the questions on political affiliations prevented the committee from determining his character and fitness. I find apposite the statement in the minority report of the committee: "* * * On this record, it is pure sophistry to hold that his refusals to answer have prevented our determining his character."

I also fail to perceive the necessity for the delay of an entire year between the conclusion of the hearing and the decision of the committee. Although the majority report denied applicant admission to the bar essentially because they claimed his failure to reply to questions on membership in the Communist Party or other subversive groups prevented inquiry into subjects which bear on the issue of character, it is significant that the majority made favorable findings on all matters designed for inquiry in our rehearing order. They found that applicant's views on the right to revolution were not objectionable; nor was there anything objectionable in his activities since the original petition was denied, or with respect to his present reputation. The report stated:

"Since applicant's original application was denied, he has engaged principally in the academic life as an instructor and research assistant at the University of Chicago. * * * From the character affidavits and reference letters which have been submitted to us, it would appear that the applicant is well regarded by his academic as-

sociates, by professors who have taught him in school and by members of the Bar who know him personally. We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group."

Under these circumstances, I find more cogent the rationale of the minority report that since there were no adverse findings on the questions specified for rehearing, and no derogatory information, applicant should not have been denied admission to the bar. I find entirely reasonable the minority's argument that applicant's refusal to answer certain questions was merely one factor which must be weighed along with the reasons for such refusal, and with other evidence; and that refusal to answer questions on grounds of devotion to constitutional principle does not "reflect adversely on character" and is a strange basis for denying admission to the bar.

With reference to the legal questions, I cannot agree with the statement in the *per curiam* opinion that the relevancy and constitutionality of the political-affiliations questions of bar applicants is no longer debatable. That issue has certainly not been determined in any bar admission case. It was expressly left undetermined in the *Konigsberg* case. In fact the court there recognized, as Anastaplo has consistently argued, that there was authority for regarding such questions as unconstitutional. The court stated at p. 270: "Prior decisions by this Court indicate that his [Konigsberg's] claim that the questions were improper was not frivolous (*West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 87 L. ed. 1628), and we find nothing in the record which indicates that his position was not taken in good faith."

The *Barnette* case, cited by the court, contained the following celebrated passage at p. 642: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, *or force citizens to confess by word or action their faith therein.*" [Ital. supplied.]

While this passage, which has not been overruled, lends support to applicant's position that a Character and Fitness Committee, acting for the State Supreme Court would have no right in insist that an applicant reveal his faith in any political credo, that case itself is not decisive. Nor can I agree with the *per curiam* opinion that the recent *Barenblatt* case (*Barenblatt* v. *United States*, — U.S. —, 3 L. ed. 2d 1115, 79 S. Ct. 1081 (1959) is determinative of that issue, or is in any way factually analogous.

The *Barenblatt* case involved a contempt proceeding in which the petitioner refused to answer questions of the House Un-American Activities Committee relating to his affiliations with the Communist Party on the ground that they were barred by the first amendment. The majority opinion, to which four justices dissented, first explained that where first amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the private and public interests at stake in the particular circumstances. After reaffirming the principle of the *Sweezy* case (*Sweezy* v. *New Hampshire*, 354 U.S. 234, 265, 1 L. ed. 2d 1311), that "the subordinating interest of the State must be compelling," in order to overcome the individual rights, the Supreme Court held that the balance must be struck in favor of the governmental interests, since the pertinency of the questions was not open to doubt, and the government's right of self-preservation justified extending its investigatory power in the domain of communist infiltration in education.

Even the broadest interpretation of the *Barenblatt* case, however, would not sanction the type of inquiry made by the committee herein. The court based its decision, in a great measure, on the fact that the inquiry in that case was identified at the outset as an investigation of Communist infiltration in education, and that the individual examined had just previously been identified as a member of an alleged Communist group, and was being asked about that membership.

Such circumstances are a far cry from the situation in the case at bar. It is one thing to sustain the constitutionality of subversive affiliations questions when they are propounded to one identified as a Communist, and submitted by an Un-American Activities Committee of the United States Congress, charged with discovering communist infiltration. It is quite another thing, however, to sanction such questions when asked of one against whom there is not a scintilla of evidence of subversive affiliations, and when the questions are submitted by a bar admission committee, charged only with ascertaining applicant's moral character, and in no way authorized by statute or rule of court to investigate or reject members of any political persuasion from the profession.

In my judgment, furthermore, the fact that the court in the *Barenblatt* case so closely circumscribed its decision, limiting it to the precise circumstances before it, stressing the pertinency of the questions, and calling attention to cases where the individual interests were held paramount, does not indicate a disposition to sustain the constitutionality of such questions in all types of cases.

However, this issue is not decisive in the Anastaplo case. As hereinbefore noted, the fundamental issue is not the constitutionality of the political-affiliations questions,

but rather whether applicant's refusal to answer them could be deemed grounds for denial of admission to the bar for failure to establish good moral character. Therefore, I do not deem it necessary to try to resolve the constitutionality of the questions by analogy to the host of other related cases. (*N. A. A. C. P.* v. *Alabama,* 357 U.S. 448, 2 L. ed. 2d 1488; *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 94 L. ed. 925; *Slochower* v. *Board of Higher Education,* 350 U.S. 551, 100 L. ed. 692; *Kent* v. *Dulles,* 357 U.S. 116, 2 L. ed. 2d 1204; *Sweezy* v. *New Hampshire,* 354 U.S. 234, 1 L. ed. 2d 1311.) Even if this court were to conclude that the subversive affiliations questions under the circumstances did not offend the first and fourteenth amendments of the Federal constitution, and that George Anastaplo had no constitutional right to refuse to answer the committee's question, his refusal would constitute merely one item of evidence, and we would still be obliged, under the decisions of the United States Supreme Court, to determine his moral character on the basis of the entire record. *Konigsberg* v. *State Bar of California,* 353 U.S. 252; *Schware* v. *Board of Bar Examiners,* 353 U.S. 232.

In evaluating that record, furthermore, this court may not draw any unfavorable inferences of character from an applicant's refusal to answer questions based upon a good faith reliance on constitutional principles. *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 1 L. ed. 2d 810.

Inasmuch as I am firmly convinced that the law set forth by the United States Supreme Court in the *Konigsberg* case is determinative of the issue in the instant case, I am obliged to closely examine that decision and the ineffective ways in which the *per curiam* opinion has endeavored to whittle it away and to avoid it as a precedent.

In the *Konigsberg* case a bar applicant who had been identified as a Communist, and had been highly critical of government policies in his writings, was interrogated about his political affiliations and beliefs by the Bar Admission Committee in order to discover whether he was, or had ever been a member of the Communist Party. As in the instant case, the applicant refused to respond to such questions on the ground that they were an intrusion into areas protected by the Federal constitution. He also objected on the ground that California law did not require him to divulge his political associations or opinions in order to qualify for the bar, and that the questions about these matters were not relevant. The Committee denied his application for admission, essentially on the ground that he failed to demonstrate that he was a person of good moral character. The action of the Committee was affirmed by the State court, but was reversed by the United States Supreme Court.

That decision emphasized (1) that bar admission cannot be denied for failure to establish good moral character, unless it appears from an examination of the entire record that a reasonable man could fairly find that there were doubts about applicant's honesty, fairness and respect for the rights of others, and for the laws of the State and the nation; (2) that much significance should be attached to the affidavits relating to applicant's character, and the absence of derogatory testimony; and (3) that in a bar admission case no unfavorable inferences on moral character may be drawn from refusal to answer questions on constitutional grounds.

The *per curiam* opinion, of course, makes no reference to the court's statement at p. 270 disposing of the precise issue involved herein: "Obviously the State could not

draw unfavorable inferences as to his [applicant's] truthfulness, candor or his moral character in general if his refusal to answer [the political affiliations questions] was based upon a belief that the United States Constitution prohibited the type of inquires which the Committee was making." Nor does the *per curiam* opinion take cognizance of the decisive statement of the court at p. 273: "Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law."

What "authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him" did the committee have against George Anastaplo? His refusal to answer questions on grounds that they were improper under the first and fourteenth amendments of the constitution? That conduct, according to the United States Supreme Court, may not be deemed adverse character evidence. The record is absolutely devoid of any conceivable derogatory evidence. If the United States Supreme Court had difficulty comprehending why Konigsberg was rejected even though there was some evidence of prior Communist membership and certain inflammatory writings, it would, *a fortiori*, have greater difficulty understanding why Anastaplo was denied admission to the bar where even the committee chairman admitted that there was no evidence whatever that the applicant was in any way ever connected with the Communist Party or with any subversive group.

The *per curiam* opinion endeavors to avoid the impact of this *Konigsberg* case by suggesting that it was not a final determination, since the cause was remanded to the State Court. This is specious reasoning. Obviously the case had to be remanded to the State court, for it is not

the province of the United States Supreme Court to admit persons to membership to the bar of any State, but rather to determine whether the actions and standards imposed by the State in bar admission cases infringed constitutional rights. This the Supreme Court unequivocally did in the *Konigsberg* case, and any subsequent action by the California court in that case cannot modify, or in any way detract from the principles of law promulgated by the Supreme Court in the decision. Its determination that constitutional rights (the due-process guarantee) are infringed when a State denies an applicant admission to the bar for failure to establish good moral character, merely because he refuses on constitutional grounds to answer political or subversive affiliations questions, is binding upon this court and cannot be construed away.

The *per curiam* opinion further attempts to avoid the *Konigsberg* precedent by construing it holds only that there was inadequate notice to the applicant that refusal to answer would warrant rejection. The opinion then asserts that since such a warning was given in the instant case the *Konigsberg* decision is distinguishable. This attempt at refinement of the decision is contrary to the facts. The applicant in the *Konigsberg* case was given the same notice as Anastaplo was given. He was informed that refusal to answer would have a bearing on the committee's determination, and that some committee members did not agree that he had a constitutional right to refuse to answer (Footnote p. 259.) Similarly, the committee herein warned Anastaplo at p. 37 of the record, that his "refusal to answer may be taken into account by the Committee in determining whether you have established your fitness to become a member of the bar." In neither case was the applicant advised that refusal to answer would *ipso facto*

warrant a denial of admission, irrespective of any and all other evidence. On the contrary, the actions of the committee in the instant case in conducting 5 more lengthy hearings, in encouraging the applicant to submit his writings and any other evidence, and in stating that it was "interested in your reasons for not answering," are inconsistent with any warning that refusal to answer would automatically preclude Anastaplo's admission to the bar.

Moreover, even if such a warning had been given, it would have been, according to the *Konigsberg* case, beyond the power of the committee. The court in that case noted that the committee has no authority or power by statute, decision or rule of court to apply a "brand new exclusionary rule," or a "brand new sanction on analogy to the summary contempt cases," whereby refusal to answer a question would mean rejection. The court stated at p. 260-261: "There is nothing in the California statutes, the California decisions or even in the Rules of the Bar which has been called to our attention, that suggests that failure to answer a Bar Examiner's inquiry is ipso facto a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners." Nor is there any such authority in Illinois for applying any such "brand new exclusionary rule."

Equally untenable is the attempt to sidestep the *Konigsberg* case by bandying about words and arguing that this court is not drawing unfavorable character inferences from applicant's refusal to answer the political affiliations questions, but that such refusal prevented inquiry into subjects which bear upon his character and resulted in his failure to establish good character. As stated in the

minority report, this reasoning is "pure sophistry." Any realistic appraisal of this record indicates that from the searching examination of applicant, from his letters and writings on the responsibilities of a citizen and lawyer to our government, from the writings of statesmen and scholars whose views he embraced, from the affidavits elicited by the committee, and from the committee's own independent investigation, it should have known well George Anastaplo, his moral character and his views respecting our constitutional government. Moreover, through its power of subpoena, the committee could have supplemented that fund of knowledge if necessary.

Therefore, in my judgment the determinative principles of the *Konigsberg* case cannot be avoided by any of the techniques of construction advanced in the *per curiam* opinion. Nor is the law of that case in any way modified or affected by the *Beilan* and *Lerner* cases relied upon by the *per curiam* opinion. (*Beilan* v. *Board of Education*, 357 U.S. 399, 2 L. ed. 2d 1414; *Lerner* v. *Casey*, 357 U.S. 468, 2 L. ed. 2d 1423.) These cases both carefully distinguished the *Konigsberg* case. They involved public employees who were dismissed under the Pennsylvania School Code and the New York Security Risk Law, respectively, for refusing, on fifth amendment grounds, to answer questions about membership in the Communist Party.

For those cases to be determinative of the Anastaplo case, we must equate "refusal to answer" with failure to establish good moral character. This means that the remainder of the evidence in the record, including all of the other questions and affidavits of good moral character is immaterial. Under this interpretation, the committee should have concluded the hearing after the first unanswered question on religious affiliations at p. 18 of the

record, or shortly thereafter at p. 34, when the first political affiliations questions were unanswered, for nothing said thereafter would have any significance.

How can this interpretation be squared with the committee's statement at p. 37 of the record that it was interested in applicant's reasons for not answering, or with the 6 sessions it held, or with the 400-page record it encouraged? How can such a course be followed in the light of the determinations in the *Konigsberg* case at p. 264 that in bar admission cases moral character must be determined from the entire record, and that refusal to answer on constitutional grounds is an insufficient basis for a finding of failure to establish good moral character.

The construction advanced by the *per curiam* opinion, moreover, would be inconsistent with the purpose and function of a character and fitness committee. That body is not an Un-American Activities Committee charged with investigating Communists, with power to require—indirectly—non-communist oaths on pain of denial of admission to the bar. Nor it is conducting a contempt proceeding with the denial of the right to practice law imposed as punishment for refusal to answer questions which the Committee regards as "proper." It is not inconceivable, furthermore, that refusal to answer might be more indicative of good character in some instances, than answering. We have only to recall the unconstitutional religious interrogation of applicant herein to appreciate that fact.

Furthermore, the *per curiam* opinion has apparently lost sight of the fact that the *Lerner* and *Beilan* cases did not involve bar admissions, but rather the duties of public employees to their employer—a category which has long been given special treatment in the law. (*Garner* v. *Board of Public Works*, 341 U.S. 716, 95 L. ed. 1317; *Adler* v. *Board*

of Education, 242 U.S. 485, 96 L. ed. 517.) In fact, the *Lerner* and *Beilan* cases add very little to the law laid down in the *Garner* and *Adler* cases, which were decided long prior to the *Konigsberg* case, which did not even refer to those cases or regard them as authoritative in bar admissions interrogations.

In relying upon the *Beilan* and *Lerner* cases the *per curiam* opinion has deliberately overlooked the striking differences in the operative facts of those cases and the case at bar. The *Beilan* and *Lerner* cases involved evidence of "suspect activities," and membership in the Communist Party, all of which is entirely lacking in the instant case. Moreover, refusal to answer the subversive affiliations questions in those cases was predicated upon the privilege against self-incrimination, whereas in the case at bar Anastaplo would refuse to answer even if the replies reflected favorably upon him. In fact, his refusal was not limited to questions about subversive groups, but extended to all political affiliations, including membership in the Republican and Democratic parties.

In my judgment these fundamental differences in the operative facts certainly affect the significance of the refusal to answer, and warrant treating such refusal differently in the *Lerner* and *Beilan* cases than in the case before us.

In reviewing the other authorities cited by the *per curiam* opinion, I note the conspicuous omission of any discussion of the leading bar admission case of *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 1 L. ed. 2d 796. In that case the United States Supreme Court in a unanimous decision held that unless the committee's finding of failure to establish good moral character is substantiated by evidence, a denial of admission to the bar on that ground violates the due-process clauses of the Federal and State constitutions.

The court held that irrespective of whether the practice of law is labelled a "right" or a "privilege" (which the *per curiam* opinion calls it), an applicant cannot be excluded from practice in a manner, or for reasons that contravene the due-process clause of the fourteenth amendment. At p. 239, the court emphasized that any qualifications imposed by the State must have a rational connection with the applicant's fitness or capacity to practice law. Not only must the State avoid arbitrary standards, but even in applying permissible standards, it cannot exclude an applicant when there is no basis for finding that he fails to meet these standards.

After a review of the relevant principles of law in bar admission proceedings, the court found that neither membership in the Communist Party during the years between 1932 and 1940, nor the use of aliases to secure jobs, nor arrests under the particular circumstances constituted adverse evidence of moral character. The court reasoned that even though the nature and purposes of the Communist Party of 1950, as viewed in the *Douds* case (*American Communications Assn, C. I. O.* v. *Douds*, 339 U.S. 382, 94 L. ed. 2d 925) may warrant classifying it differently from other political parties, that view did not constitute a "substitute for evidence" to show that the petitioner participated in any illegal activity or did anything morally reprehensible as a member of the party.

The court quoted with approval the concept that "Mere unorthodoxy (in the field of political and social ideas) does not as a matter of fair and logical inference negative good moral character." It then stressed the importance of the character affidavits and the absence of derogatory testimony, and concluded that since there was no evidence to justify the bar examiners' finding that petitioner had not shown "good moral character," the action of the

board, refusing to permit petitioner to take the bar examination, deprived him of due process of law.

If actual membership for 7 years in the Communist Party did not *per se* justify a finding of failure to establish good moral character in the opinion of the United States Supreme Court in the *Schware* case, then I fail to perceive how mere disagreement over constitutional interpretation can be deemed such morally reprehensible conduct as would support a finding of failure to establish good moral character, as the *per curiam* opinion has affirmed in the instant case.

Before concluding this dissenting opinion, I am constrained to note that it is hardly consistent with judicial objectivity for the *per curiam* opinion to have overlooked every item of positive evidence submitted in support of establishing applicant's good moral character. Guidance on the meaning of the phrase "good moral character" is found in Justice Frankfurter's concurring opinion in the *Schware* case where the learned Justice stated: "It is a fair characterization of the lawyer's responsibility in our society that he stand 'as a shield,' to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility that have, through the centuries, been compendiously described as 'moral character.' "

Anyone reading this record, whether or not he agrees with George Anastaplo's interpretation of his constitutional rights, cannot come away without being impressed by his adherence to truth and what he regards as basic principles of good citizenship. His refusal to answer certain questions is not in fear of the truth, but rather in defense

of what he believes to be the truth—that a citizen, particularly a lawyer, has a duty to defend constitutional principles, "even at the risk of incurring official displeasure." His restrained and well mannered testimony and conduct at the hearing corroborate fully the glowing evaluations of his character and reputation in the affidavits submitted to the committee.

On the basis of this entire record, it is my opinion that there was substantial evidence of George Anastaplo's good moral character, which was in no way marred by a single item of evidence from which the committee could reasonably conclude that there were doubts about applicant's honesty, fairness and respect for the rights of others or for the laws of the nation. Under these circumstances, the committee's action denying applicant admission to the Illinois bar on the basis of its finding that he failed to establish good moral character, constituted a denial of due process of law under the decisions of the United States Supreme Court, and should properly have been rejected by this court.

SCHAEFER and DAVIS, JJ., also dissenting:

As a result of the exhaustive hearings before the Committee, we now have far more information as to the moral quality, the legal capacity and the political views of this applicant than is ordinarily the case.

The report of the Committee makes it clear that apart from the problems that stem from the applicant's insistence upon what he regards as his constitutional right to refuse to answer questions relating to his political views, there is no basis for denying him admission to the bar. The record suggests nothing derogatory as to his character or his reputation. The affirmative showing of

good character and reputation is entirely convincing. So far as the right of revolution and the use of force to overthrow the government are concerned, the applicant was unable to visualize, in the foreseeable future, any circumstances that might call for its exercise in this country. We agree with the Committee that these views, illustrated as they were by the revolt of Hitler's generals toward the close of World War II and the recent Hungarian revolt, were neither subversive nor foreign to American political philosophy.

But the applicant did refuse to answer questions as to membership in the Communist party or in subversive organizations. Those questions were not predicated upon any information that might have led the Committee to suspect such membership. Despite the fact that the application has been pending for many years, the Committee expressly states that it has "received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group."

Our prior decision determined that questions concerning the applicant's membership in the Communist Party or in subversive organizations were relevant, and we must now determine the consequence to be attached to his refusal to answer them. It is possible to say that he has refused to answer relevant questions, that the burden of proof rests on him and that he must therefore be denied admission to the bar.

In our opinion, however, a more penetrating approach to the problem is necessary if we are to discharge our duty with fairness and justice. The applicant has refused to answer these questions because he believes that they violate his rights under the first and fourteenth amendments to the constitution of the United States. He has

expressly disclaimed any reliance upon the privilege against self-incrimination. His views as to the constitutional propriety of the questions may be right or they may be wrong, but there seems to be no doubt as to their sincerity. Adherence to them has prevented his admission to the bar for many years. We do not see in this record any basis for a finding that the applicant's refusal to answer raises a doubt as to the sincerity with which he takes the oath to support the State and Federal constitutions.

We think that it is unnecessary and inappropriate to decide this matter as though it called for an exercise of the ultimate limits of State power with respect to admission to the legal profession. What is involved is no more than an appraisal of the applicant's moral character and his fitness to practice law. His views upon the right of revolution were fully expounded before the Committee. Those views are incompatible with membership in the Communist Party, or with anything resembling subversion. It is hard to understand the logic of a position that permits the applicant to expound at length upon his views as to the rights of revolution but prevents him from answering questions as to Communist party membership. But we can not say that what seems to us to be a logical inconsistency is a reflection upon his character.

It is true that the work of the Committee has been greatly increased by the applicant's refusal to answer directly. But that refusal appears to have been sincerely based upon constitutional grounds that can not be said to be entirely implausible. To refuse admission, therefore, would amount only to an assertion of power beyond that which is required in order to determine the question before the court.

In our opinion the record sufficiently demonstrates that the applicant possesses the requisite qualifications for admission to the bar.

V.

LETTER TO PETITIONER FROM THE COMMITTEE SECRETARY, FEBRUARY 17, 1960.

Referring to your letter of February 5, 1960,* I. have

*This letter is in response to petitioner's letter to the Committee Secretary, February 5, 1960:

"No doubt the Committee is aware of the final disposition of my matter by the Illinois Supreme Court. Because of the limited period during which one may appeal, I must now proceed with steps to prepare the case for consideration by the United States Supreme Court.

"I should like, nevertheless—especially since I have never regarded my matter simply as a "test case" but primarily as a serious effort to gain admission to the bar—, to make every effort to settle this controversy in a manner consistent with the principles and sensibilities of all parties. I wonder, therefore, whether, in the light of the Record and of the various opinions filed by the members of the Supreme Court of this State, the Committee is willing, upon my bringing the standard applicant's questionnaire up-to-date since my last hearing (and assuming there is nothing improper indicated therein respecting my activities since the most recently executed application), to certify me for admission to the bar at this time.

"I am sure that, if an understanding should be reached beforehand, the matter could be formally brought before the Committee—for example, by a rehearing, to which an applicant is entitled six months after rejection—so as to return jurisdiction of the matter to the Committee.

"The Illinois Court has, by a 4-3 vote, confirmed the power of the Committee to insist on certain questions. But, as I read the three opinions, the Court does not advise the Committee that it must insist on such questions. Thus, my inquiry is, in effect, whether the Committee, having been upheld by its Court in its claim of power, now wishes to exercise that power to the legal limit in this particular situation. I am moved to make this effort partly because three members of the Court have explicitly endorsed, without challenge from their colleagues, my qualifications for the practice of law.

"I write as I assume an attorney would on behalf of his client—as an attorney trying to learn whether a long-standing controversy can be settled in such a way as to avoid the unnecessary expense, effort or risk that an appeal might require of all parties. And, to be perfectly frank, I do not look forward, either as attorney or as client, to the many months of litigation that lie ahead, especially if they can be reasonably and honorably avoided by a settlement out of court.

"I hope the Committee is able to give my suggestions due consideration.

been instructed by the Committee on Character and Fitness to advise you that the Committee is of the view that there is nothing before it upon which it can act.

In any further proceeding, the Committee will be bound by the action of the Illinois Supreme Court and of the Supreme Court of the United States if that Court takes the case.

VI.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The provisions of the Constitution of the United States involved are as follows:

> No State shall . . . pass any Bill of Attainder [or] *ex post facto* Law . . .
>
> Article I, Section 10
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> Amendment I
>
> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Amendment XIV

The appropriate parts of the statutes involved are as follows:

Rule 58, Section IX, Rules of Practice and Procedure of the Supreme Court of Illinois; Ill. Rev. Stat. 1951, chap. 110, par. 259.58, IX.

1. At the November term in each year, the Supreme Court shall appoint a Committee on Character and Fitness in each of the Appellate Court Districts of this State, consisting of not less than three members of the bar. . . .

2. Before admission to the bar, each applicant shall be passed upon by the Committee in his district as to his character and moral fitness. He shall furnish the Committee with an affidavit in such form as the Board of Law Examiners shall prescribe concerning his history and environments, together with the affidavits of at least three reputable persons personally acquainted with him residing in the county in which the applicant resides, each testifying that the applicant is known to the affiant to be of good moral character and general fitness to practice law, setting forth in detail the facts upon which such knowledge is based. Each applicant shall appear before the Committee of his district or some member thereof and shall furnish the Committee such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the bar.

3. If the Committee is of the opinion that the applicant is of approved character and moral fitness, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar.

Ill. Rev. Stat. 1951, chap. 13, par. 4.

Every person admitted to practice as an attorney and counsellor at law shall, before his name is entered upon the roll to be kept as hereinafter provided, take and subscribe to an oath, substantially in the following form:

I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of attorney and counsellor at law to the best of my ability.

FILE COPY

FILED
SEP 23 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 58

IN RE
GEORGE ANASTAPLO,
Petitioner.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

HARRY KALVEN, JR.,
ROSCOE T. STEFFEN,
c/o American Civil Liberties
Union, Illinois Division,
19 South La Salle Street,
Chicago 3, Illinois,
Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Table of Authorities Cited	ii
Interest of Amicus	1
The Question Presented	2
Matters Not in Dispute	3
The Main Argument	9
A. Evidentiary Grounds for Denial	10
B. The Oath as a Basis of Denial	15
C. Automatic Grounds for Denial	18
D. Authorities Distinguished	23
Conclusion	26

Table of Authorities Cited.

Cases.

American Communications Association v. Douds, 339 U. S. 382 (1950) 3
In Re Anastaple, 3 Ill. 2d 471 (1954) 16
Barenblatt v. United States, 360 U. S. 109 (1959) 21
Beilan v. Board of Education, 357 U. S. 399 (1958) 4, 24
In Re Day, 181 Ill. 73 (1899) 7
Dennis v. United States, 341 U. S. 494 (1951) 3
Fiske v. Kansas, 274 U. S. 380 (1927) 14
Ex Parte Garland, 4 Wall. 333 (1866) 5
Garner v. Board of Public Works of Los Angeles, 341 U. S. 716 (1951) 24
Girouard v. United States, 328 U. S. 61 (1946) 23
Kimm v. Rosenberg, 363 U. S. 405 (1960) 23
Konigsberg v. State Bar of California, 353 U. S. 252 (1957) 3, 4, 5, 6, 9, 11, 12, 14, 19, 20, 25
Lerner v. Casey, 357 U. S. 468 (1958) 4, 24
Orloff v. Willoughby, 345 U. S. 83 (1953) 24
Railroad Co. v. Rockafellow, 17 Ill. 541 (1856) 16
Schware v. Board of Examiners, 353 U. S. 232 (1957) .. 5, 6
In Re Summers, 325 U. S. 561 (1945) 17, 18, 23
United States v. MacIntosh, 283 U. S. 605 (1931) 23
United States v. Schwimmer, 279 U. S. 644 (1929) 23
Wieman v. Updegraff, 344 U. S. 183 (1952) 5
Yates v. United States, 354 U. S. 298 (1957) 3

Statute.

Ill. Rev. Stats. 1959, Ch. 110, ¶ 101.58, Sect. IX 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 58.

IN RE
GEORGE ANASTAPLO,
Petitioner.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

INTEREST OF AMICUS.

The American Civil Liberties Union appears as *amicus curiae* in this case with the consent of both parties filed with the Clerk of the Court. This informal memorandum is submitted to be of what help we can to the Court. Counsel for amicus also are friends of the Petitioner, whom we knew first as a law student at the University of Chicago, and we have followed with some concern the long course of his efforts since 1951 to become a member of the bar of Illinois. We know that the Petitioner has been quite independent in his views; that he has insisted upon his position—stubbornly if you will—as a matter of principle, when he could easily have taken a more

conformable course; that he has taken many hours of bar committee time, and that many tempers have been ruffled. But, we also know that the Petitioner has acted in good faith, with dignity and at considerable personal sacrifice to himself and his family in an honest belief that he is right. We realize, of course, that our personal assessment of the Petitioner can scarcely weigh in the determination of the issue now before this Court but we would be less than candid if we did not acknowledge at the outset the affection, concern, and respect we feel for him.

We realize that the issues raised by the Petitioner's stubbornness as they come before this Court are rich in perplexities. But as teachers of law engaged in training young men for a life at the bar, we are impressed, too, with the large significance of these issues. They involve nothing less than a definition of the desired moral character of the American bar; and as such they touch matters of national public interest. For an independent, intellectually honest and morally courageous bar is as integral to the sound functioning of American democracy as is an independent judiciary.

THE QUESTION PRESENTED.

The question presented for review in this case is whether a state in the regulation of admission to its own bar can, consistently with the mandate of the Fourteenth Amendment, deny admission to an applicant who in good faith and as a matter of principle or conscientious objection refuses to answer whether he is a member of the Communist Party, assuming that the record apart from this refusal contains adequate and satisfactory evidence that he has the requisite moral character.

MATTERS NOT IN DISPUTE.

We begin with a series of points as to which there is, we think, no substantial disagreement. Discussion of these, however, will conveniently serve as a preface to the argument which follows:

First, the propriety of the question about Communist affiliations need not, in our view, be in issue. That is, the Petitioner's case does not stand or fall on the argument that the question is improper and beyond the power of the bar committee to ask. For the sake of argument, it can be conceded that the question is proper and relevant, and that the asking of it does not violate any constitutional privilege of the Petitioner.

We would note, however, that the Petitioner's objections to the question were not frivolous at the time he first made them in 1951, preceding as they did the decision in *Dennis* v. *United States* (1951), 341 U. S. 494, and have not become frivolous since. This Court has never passed on the exact issue presented. The case most closely in point, *American Communications Ass'n* v. *Douds* (1950), 339 U. S. 382, might well be distinguished, upon full consideration, because of the differences between labor union leaders and members of the bar. Further, in *Konigsberg* v. *State Bar of California* (1957), 353 U. S. 252, this Court explicitly said that the issue was not frivolous. And the only noteworthy development since *Konigsberg* is the decision in *Yates* v. *United States* (1957), 354 U. S. 298, which served to narrow appreciably the degree to which being a member of the Communist Party might constitute a crime. Finally, we would emphasize that Petitioner's objections have special merit on this record, since the Bar Committee laid no adequate foundation for asking him questions about membership in the Communist Party.

Second, there can be no doubt of the inadequacy of the

warning to Petitioner, that is, if Illinois now seeks to justify its action upon the ground only that Petitioner refused to answer a relevant question.

The Committee at no time gave the sort of warning contemplated by Mr. Justice Black, in *Konigsberg*, 353 U. S. at p. 260-1, or, as was actually given in *Lerner* v. *Casey*, 357 U. S. 468 and in *Beilan* v. *Board of Education*, 357 U. S. 399. That is, he was never told that failure to answer the question: Are you a Communist? Would of itself be ground for denying his petition.

Both Committee and Court state the contrary, for they say: "unlike the situation in *Konigsberg*, no problem exists as to inadequate notice of the consequences of a refusal to answer." (Petition, p. 24 and p. 48.) The Committee points to two places in the record to support its statement, but it will be enough to refer to one only, as the other is equally inadequate. At pages 116-117 of the Committee Record (one of the two references), Commissioner Stephan tells Petitioner that the question is an important one—"to be treated very seriously" —and then follows this colloquy:

> Mr. Anastaplo: Yes, I would like to find out exactly what this entails. You are not suggesting that refusal to answer that question would *per se* block my admission to the bar?
>
> Commissioner Stephan: No, I am saying your refusal to answer that question as to whether you are a member of the Communist Party, could and might.
>
> Mr. Anastaplo: I see.

It is surely clear that a "could and might" warning is a very different thing from a peremptory warning that unless Petitioner answer he will be barred. The Committee's warning went only so far as to tell Petitioner that a failure to answer the Communist question would be weighed heavily in determining "moral character and good

citizenship;" it was an assurance that the Committee would not make failure to answer an automatic bar, as considered in *Konigsberg*.

Third, we assume that nothing turns on whether we classify admission to the bar as a matter of *privilege* or as a matter of *right*. This old dichotomy is not an aid to analysis. It is clear that, however we classify it, admission to the bar involves substantial interests of the applicant, who has invested much time and money in the pursuit of legal training. In *Schware* v. *Board of Examiners* (1957), 353 U. S. 232, moreover, this Court has set the matter at rest. Even if admission to the bar is seen as a privilege, it is a privilege which can be denied by a state only if there is compliance with the mandate of the Fourteenth Amendment.

Fourth, we assume that this case presents no question of special sensitivity in the area of state-federal relationships. One might well argue on the contrary that there is a strong national interest in the moral quality of state bars making up as they do the national bar. But we take it to be clear, in any event, that the state has no *special* local interest in this matter, greater, for example, than it had in determining the qualifications for school teachers in *Wieman* v. *Updegraff* (1952), 344 U. S. 183. Indeed, one of the most recent decisions of this Court (*Schware* v. *Board of Examiners* (1957), 353 U. S. 232), found invalid, under the Federal Constitution, efforts of the state to regulate admission to its bar. See also, *Ex Parte Garland* (1866), 4 Wall. 333.

Fifth: There is no dispute that petitioner must carry the burden of proof, that is, the burden of furnishing the Committee with "such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the Bar." Ill. Rev. Stat. 1959, c. 110, §101.58. Sect. IX.

While this language requires that the Committee must be satisfied of Petitioner's qualifications, we take it to be clear that the Committee may not for some captious reason refuse to certify an applicant, and thus block his admittance to the Bar. In the first place, the Committee is but an agency of the Supreme Court, and it is the Court which has the plenary power to grant or deny admission. The findings of the Committee are entitled to respect, much as are the findings of a master, but they are not binding upon the Supreme Court.

Further, we assume that the Illinois Supreme Court must itself be guided by some objective standard in determining what constitutes "moral character and good citizenship." We recognize that this language is ambiguous, but it would be quite intolerable to suppose that, therefore, it gives either court or committee free rein to give it a biased or irrational meaning. *Schware* v. *Board of Bar Examiners* (1957), 353 U. S. 232. Indeed, it would be meaningless to speak of "burden of proof," as Mr. Justice Harlan does in *Konigsberg* (1957), 353 U. S. 252, 277, if there were no discernible standard to be met.

It is thus evident that Petitioner is not faced with Mr. Justice Harlan's contention in *Konigsberg* (1957), 353 U. S. 252, 311, that a State through its Admissions' Committee may properly require an applicant to answer any relevant question (not constitutionally privileged) as a condition of admission. Nor is it necessary to point out that insistence upon a bureaucratic nicety of that sort, in complete disregard of substantial evidence of moral character and good citizenship, might be an unwise way for a State to order its affairs. It is enough to say that Illinois has not done so.

We do not enter upon a discussion of whether, in Illinois, it is a function of the Court or of the Legislature to state the qualifications for admission to the Bar. Grant that

it is a power inherent in the Court, *In re Day* (1899), 181 Ill. 73, 89, nevertheless, nothing turns on the point here, for the Court has long accepted the legislative test of "moral character and good citizenship." But it is important to insist, as Chief Justice Cartwright stated in that case, that admission to the bar is an "exercise of judicial power"; admission or exclusion "is not the exercise of a mere ministerial power." Ibid. p. 90.

Sixth: It is also clear, we submit, that Petitioner has met the burden of proof; that is, there can be no rational doubt that—save for his refusal to answer questions concerning his religious and political affiliations, a matter to be discussed later—Petitioner has fully established his "moral character and good citizenship," however strict the standard may be. Not only has he furnished far more affirmative evidence than is usual, but he has freely answered the Committee's questions for hours on end concerning his background, his views on political and social questions, on all manner of things. And, it is significant, that neither Court nor Committee has pointed to any evidence raising any doubt as to petitioner's moral qualifications or his good citizenship.

The Committee, in fact, expressly put the point beyond question when it said:

> Since applicant's original application was denied, he has been engaged principally in the academic life as an instructor and research assistant at the University of Chicago. From the character affidavits and reference letters which have been submitted to us, it would appear that the applicant is well regarded by his associates, by professors who taught him in school and by members of the Bar who know him personally. We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside source which would cast

any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group. (Petition, Appendix pp. 11-12.)

Seventh: We take it, finally, to be clear that Petitioner has maintained his position throughout this proceeding in sincere and dignified adherence to principle. The record discloses him to be a man well read in philosophy, in government and in the history of social ideas, who holds the refreshing view that the ringing declarations of Jefferson, Lincoln, and our other great leaders are to be taken seriously—particularly by members of the bar. The minority members of both Court and Committee have stated their belief in Petitioner's sincerity.

Indeed, the majority report of the Committee would indicate that, so far from having any doubts of Petitioner's sincerity, it was disturbed rather by the firmness of his convictions. The report states:

> A majority of the Committee has arrived at the conclusion that the views expressed by the applicant with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines. (Petition, Appendix p. 14.)

Thus it is not Petitioner's good faith which is in question but whether his sincere belief that the rights afforded by the First and Fourteenth Amendments are broader than this Court has yet declared them to be, is to be brushed aside and wholly ignored when passing on his moral character and good citizenship. Were the Constitution a thing of fixed and unchanging content something could be said for this view, but it is not. Moreover, it is the business

of the lawyer, as of the dissenting judge, as a matter of intellectual integrity, to insist on his views in all proper ways, even though contrary to the existing order. Petitioner's views may be wrong; he may have chosen the wrong forum in which to assert them; but, surely, he is not to be said, because of a good faith error of judgment, to have failed to make out a case of good moral character.

In his dissent in *Konigsberg*, 353 U. S. 252, at 312, Mr. Justice Harlan writes that "a State may refuse admission to its Bar to an applicant, no matter how sincere, who refuses to answer questions which are reasonably relevant to his qualifications and which do not invade a constitutionally privileged area." We have pointed out above that Illinois has not made refusal to answer, but a lack of "moral character and good citizenship," the test. Even if this were not true, we respectfully suggest that it will not do to lump all questions together, just so long as they are relevant. It is one thing to require an applicant to answer as to his age, his past addresses, his employers, and quite another to insist that he say whether he is a Republican, a Democrat, or a Communist. The question here is whether a petitioner, who in good faith believes that the latter questions "invade a constitutionally privileged area," and refuses to answer them on that ground, may be denied admission, if he in all other respects is eminently well qualified.

THE MAIN ARGUMENT.

The majority of the Illinois Committee on Character and Fitness, in denying the Petitioner's application appears to have done so on confused grounds. It stated that his refusal to answer questions about Communist affiliations: "(i) obstructs the lawful processes of the Committee, (ii) prevents inquiry into subjects which bear intimately on the issue of character and fitness, such as loyalty to

our basic institutions, belief in representative government and *bona fides* of the attorney's oath and (iii) results in his failure to meet the burden of establishing that he possesses the good moral character and fitness to practice law, which are conditions to the granting of a license to practice law." (Petition, Appendix p. 26.) And again the Committee states: "By reason of applicant's own recalcitrance he has failed to demonstrate the good moral character and general fitness to practice law necessary for admission to the Bar. We cannot certify the applicant as worthy of the trust and confidence of the public when we do not know that he is so worthy and when he has prevented us from finding out." (Petition, Appendix p. 27.)

The final action in this case, of course, was taken by the Illinois Supreme Court. The appeal herein is taken from that court's decision, not from the action of the Committee. But the Illinois court wrote only a *per curiam* opinion and, on careful reading, we find no point at which it disapproves or departs from the majority report of the Committee on Character and Fitness. Indeed, the final sentence of the court's opinion states: "The report of the Committee on Character and Fitness is confirmed." (Petition, Appendix p. 53.) Such being the case, and since the majority report of the Committee is more explicit than the *per curiam* opinion of the Illinois Supreme Court as to the exact grounds on which the Petitioner was denied admission, we deem it appropriate to refer back to the majority report of the Committee for an authoritative statement of the grounds on which the Illinois court acted.

A. Evidentiary Grounds for Denial.

In our view, the Committee statements may fairly be read to indicate that, in the face of Petitioner's refusal to answer, it was left with a naked doubt as to Petitioner's character, and hence refused to certify him on that ground.

But, to express a doubt in such circumstances is but another way of saying that Petitioner's refusal gives rise to an inference of bad character. For surely, as pointed out above, the question is not whether the Committee or the Illinois Court had *some* doubt—which is probably true in every case—but whether that doubt, or the inference upon which it rests, is such that, notwithstanding the affirmative evidence in the case, the Committee is required to say that Petitioner has failed to sustain the burden of proof upon the question of "moral character and good citizenship."

It is necessary, at the outset, therefore, to examine what inferences may be drawn from Petitioner's refusal to answer. Presumably the Communist questions are *relevant* because activity in the Party may bear on the moral fitness of an applicant. But the Committee may also have thought that the simple fact of refusal to answer a relevant question, of whatever import, was—in and of itself—direct evidence of bad character or bad citizenship. It is our position that, whether the Committee took either or both views, Petitioner's refusals to answer in the circumstances of this case, do not on any rational view outweigh the affirmative evidence of "moral character and good citizenship" which Petitioner has presented.

It will be helpful to note at this time that the Committee and the Illinois Supreme Court may have based their action on either of two other grounds. First, the Court may have based its action on the supposed incapacity of the Petitioner to take the prescribed oath; or, second, by relying heavily on Mr. Justice Harlan's statement in *Konigsberg*, 353 U. S. 252, 311, that a State may properly deny admittance to any person who refuses to answer any relevant (and not constitutionally protected) question, the Court may have made the bare fact of Petitioner's refusal, irrespective of any character question, the ground upon which he was denied admittance. Since we are presently

concerned with questions of "moral character and good citizenship", these points will be taken up later.

We come then to what, if any, inference of bad character may be drawn from Petitioner's refusal to answer. Here the Committee appears to argue itself out of court, for it says: "We draw no inference of disloyalty or subversion from applicant's refusal to answer questions concerning Communist or other subversive organizations." (Petition, Appendix p. 26.) This surely would dispose of the point were it not for another statement by the Committee majority made earlier in its report. There, after stating quite accurately that, in the circumstances of a case such as this, *Konigsberg* had held that a Committee might not draw inferences of bad moral character, the Committee went on to say that *Konigsberg* nevertheless, "did *not* hold that such a condition of a record affirmatively entitled an applicant to certification." (Petition, Appendix p. 19.)

Thus, having put itself out of court by one door the Committee came right back in by another. It would not draw inferences of bad character; it would simply ask Petitioner the same questions over again and, if he persisted in his refusal to answer, the Committee would "not be acting inconsistently with *Konigsberg* in denying certification." (Petition, Appendix p. 19.) It is hard to imagine a more transparent disregard of the plain import of this court's holding in *Konigsberg*. The Committee's questions had no greater propriety, and Petitioner's objections were no less valid, after *Konigsberg* than before. Despite its denial, therefore, it would seem clear that the Committee may well have placed reliance on Petitioner's refusals as showing a lack of "moral character and good citizenship." Not, to be sure, in order to find that he lacked character, but to justify its refusal to certify him for admission—which comes to the same thing.

Likewise, it seems clear enough that the Committee

placed reliance on Petitioner's refusal to answer, as in itself showing a lack of "moral character and good citizenship." Indeed, the Committee says as much: "By reason of applicant's own recalcitrance he has failed to demonstrate the good moral character and general fitness to practice law necessary for admission to the Bar." (Petition, Appendix p. 27.) The Illinois court, at the conclusion of its *per curiam* opinion, repeats the Committee's statement almost word for word. (Petition, Appendix p. 53.) Thus, again, the Illinois Court and its Committee on Character and Fitness would circumvent the holding in *Konigsberg*. If it is improper, on this record, to draw inferences of bad moral character from Petitioner's refusal to answer, then it is improper to call his refusal "recalcitrance," as if that were a brand new test of character.

It is not necessary to labor the point for surely it is plain beyond words that whichever ground the Illinois court takes, it is met with the same objection. Why did Petitioner refuse to answer the Committee's questions? The record is very clear that he did so because he sincerely regarded them as an invasion of his Constitutional rights under the First and Fourteenth Amendments, not the Fifth. He has had the moral courage, moreover, through a long and trying time to insist upon his position. Nor is there any suggestion in the record—and we know of none—to indicate that he feared to answer. The Committee itself resolved the point when it said: "We have received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group." (Petition, Appendix pp. 11-12.)

A refusal to answer the Committee's questions in these circumstances is not "recalcitrance," but adherence to principle. The questions were asked initially, and from time to time over the several years, without any proper

foundation being laid for them. Petitioner asks, since he believed these questions to be improper, what was he to do? The answer is that he was to persist in his refusal, as he has done with dignity and courtesy. So far from giving rise to a permissible inference of bad character, therefore, or of bad "recalcitrance," the contrary is true. For, as Mr. Justice Black said in *Konigsberg*, at p. 273:

> A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar.

There is nothing puzzling about Petitioner's silence when asked about his religious and Communist affiliations, except to those who have forgotten the proud American traditions of personal independence. The question here is not whether Petitioner correctly measured his rights under the Constitution, for that is a matter of judgment; the question here is one of character.

Petitioner has supplied the Committee with affirmative evidence of his "moral character and good citizenship" which, except for his refusals to answer, fully satisfy his burden of proof. This is really not questioned. We submit further that Petitioner's refusal to answer Committee questions in the circumstances of this case, does not cast any rational doubt on the affirmative evidence of good character which Petitioner has furnished to the Committee. When 0 is taken from 100 it will not do to find that only 49 is left. It follows, that the Illinois court acted capriciously and with no rational basis for its actions in violation of the 14th Amendment when it denied Petitioner's application to be admitted to the Bar of Illinois. *Fiske* v. *Kansas* (1926), 274 U. S. 380.

B. The Oath as a Basis of Denial.

The Illinois Supreme Court, at the close of its *per curiam* opinion, cites *Barenblatt* v. *United States* (1959), 360 U. S. 109, to the point that "the relevance of an inquiry as to whether an applicant for admission to the bar is a member of the Communist Party is no longer debatable." Relevancy, of course, has never been the issue. It then goes on to hold "that a determination as to whether an applicant can in good conscience take the attorney's oath to support and defend the constitutions of the United States and the State of Illinois is *impossible* where he refuses to state whether he is a member of a group dedicated to the overthrow of the government of the United States by force and violence." (Petition, Appendix, p. 53, emphasis added.)

The Court does not say that it draws any inference of bad character from Petitioner's refusals. Indeed, it carefully points out that the Committee "drew no inferences of disloyalty or subversion from Anastaplo's consistent refusals to answer questions concerning Communist or other subversive affiliations." (Petition, Appendix p. 52.) Whether this is true or not, is now beside the point; the Court bases its decision here on the bare proposition that it is "impossible" for an applicant, who refuses to answer such questions, to take the oath prescribed by the Illinois legislature for applicants to the Bar.

In explanation of its position the Court states that "a strong public interest supports the interrogation of applicants for admission to the bar on their adherence to our basic institutions and form of government and that this public interest overrides an applicant's purely personal interest in keeping such views to himself." (Petition, Appendix pp. 52-53.) This statement should be read with the Court's earlier declaration that: "In seeking the privilege of admission before this Court petitioner must be

deemed to have agreed to waive his constitutional right of free speech against relevant inquiry." *In re Anastaplo* (1954), 3 Ill. 2d 471, 483. The latter is more explicit and we believe better expresses the Court's basic viewpoint.

The Illinois Court, of course, is its own best authority for this pronouncement, for it can cite no other. But the result is that, in Illinois, when the Committee room doors close behind an applicant, he has left the United States outside, his rights under the First Amendment are gone. No wonder the Committee felt free to question Petitioner at length upon his religious affiliations, as upon his membership in this, that or the other political organization. But even the Committee finally had the grace to abandon its religious inquiries, which, of course, had some relevance upon Petitioners' ability to take an attorney's oath. It did so, however, only after Petitioner had painstakingly pointed out to it that the case upon which it relied, *Railroad Company* v. *Rockafellow* (1856), 17 Ill. 541, had been repudiated in Illinois nearly a century ago. (Petition, Appendix, p. 58.)

What precisely then is the "public interest" which the Illinois Court says will override First Amendment rights? It says it is the need to interrogate applicants "on their adherence to our basic institutions and form of government." But if any one thing is clear on this record, that is just what the Committee did do, as Justice Bristow ably points in his dissenting opinion (Petition, Appendix, pp. 53-78). Petitioner *has* answered, at great length, all of the Committee's questions as to his "adherence to our basic institutions and form of government." Nor does the Court in its *per curiam* opinion indicate the contrary, except as his bare refusal to answer concerning his religious and political affiliations, is such a showing.

Petitioner states, moreover, that he fully understands the nature of the attorney's oath, and he has assured the

Committee that he is entirely willing to give such an oath, without any qualification. Any doubts which the writers of the Court's *per curiam* opinion might have had as to whether it would be *possible* for him to do so, should have been set at rest by the fact that Petitioner served 38 months in active service with the Air Force, in the Pacific, European and North African theatres of war, just prior to entering law school in the Fall of 1947. (See Petition, Appendix, p. 62.) Petitioner had thus already taken an oath to defend our institutions, and demonstrated that he knew how to fulfill such an oath, but as to this, the Court majority simply keeps silent.

We submit, therefore, that there is no substance in the Illinois Court's declaration, that it is "impossible" for Petitioner to take the attorney's oath. Hence, Petitioner has been denied his rights to equal treatment under the laws, as guaranteed by the Fourteenth Amendment. The Communist question, of course, is relevant, but a refusal to answer, in the circumstances of this case, has very little weight. The Court is not at liberty to keep the First Amendment out of its Committee rooms, when it is fairly invoked by an applicant. Justices Schaefer and Davis, in their dissenting opinion make the point this way: "We do not see in this record any basis for a finding that the applicant's refusal to answer raises a doubt as to the sincerity with which he takes the oath to support the State and Federal constitutions." (Petition, Appendix p. 80.)

We suggest, moreover, this position is not at variance with *In Re Summers* (1945), 325 U. S. 561. But, if so, it is respectfully submitted that the majority in *Summers* proceeded on an erroneous premise,—that the Illinois Court perforce had whatever power the State might have. Mr. Justice Reed put it this way (p. 570-1): "The responsibility for choice as to the personnel of its bar rests with Illinois." Hence, since the Illinois Court had denied admission, the

State was taken to have done so. But the Illinois legislature did not give the Illinois court *carte blanche* to do as it saw fit; it merely prescribed an oath to be administered judicially according to rational and customary standards. And, it is submitted, by any rational test Summers fully established his ability to take the oath.

For the same reason, it is respectfully suggested that the Illinois Court abused its powers in this case, when it declared that it is "impossible" for an applicant to take the attorney's oath, *except* he answer this or that question of the Committee. Conditions of that sort are plainly for the legislature, not the court, to write. Given an inch by *Summers*, the court now would take a country mile.

Nor may the Court take extra power to itself by claiming that it would be *administratively convenient* to require applicants to answer Committee questions under penalty of being declared ineligible to take the oath. As to that Justices Schaefer and Davis dissenting, were quite explicit: "To refuse admission, therefore, would amount only to an assertion of power beyond that which is required in order to determine the question before the court." (Petition, Appendix, p. 80.)

In sum, if the Illinois Court's position is to be sustained, this Court must give its sanction to an extravagant assertion of court power, not only to usurp functions of the Illinois Legislature, but to sweep aside as well those rights of free speech which are guaranteed to citizens under the First Amendment. Either would be an appalling thing to do.

C. Automatic Grounds for Denial.

We now reach the point that Committee and Court may have treated the bare refusal to answer any relevant question, of whatever import, as in itself a sufficient basis for barring the Petitioner, quite apart from any question of

character. If this were the basis upon which the Court and Committee acted, it would make more intelligible their indifference to the affirmative evidence of good character in the record and to the abundant evidence that the Petitioner's objection was in good faith adherence to principle. For if the operative rule is that a refusal to answer a relevant question automatically bars the applicant, then other evidence in the record is indeed not relevant because no matter how strong it is, it cannot alter the fact that the applicant has refused to answer.

It is in order, therefore, to shift to an analysis of the merits, as a constitutional matter, of a rule which makes refusal to answer in itself the basis for a bar. It should be emphasized at the outset, however, that this puts the issue far more favorably than Illinois deserves. First, Illinois does not explicitly have such a rule, announced openly and publicly, and applied with an even hand to all applicants. Nor did the Committee clearly warn the Petitioner that it would apply such a rule in his case. Thus, if Illinois is to have such a rule, it will lie concealed in the guise of evidential determinations in particular cases and will be applied more or less as a matter of Committee whim. We lack, then, the weighty and deliberate judgment of the appropriate Illinois authorities that the refusal to answer relevant questions (not an invasion of Constitutional privilege) is in and of itself a sufficient basis for barring an applicant. But of one thing we may be sure, if the Illinois Court is sustained in its present action, such a rule will have become the operational law of Illinois, more or less by default.

We are brought, therefore, to the other wing of the *Konigsberg* case, and to the question which this Court expressly reserved. The Court there said: "If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the

cases arise, will have to determine whether the exclusion is constitutionally permissible." (353 U. S. 252, 261.) It is plain, of course, that if this case is reversed upon the ground that the Illinois Court applied an irrational test of "moral character and good citizenship," the question is not reached.

Before going on it should be pointed out that Mr. Justice Black is speaking of "failure to answer a question"; Mr. Justice Harlan, in his dissent, states that an applicant's refusal to answer any questions "which are reasonably relevant to his qualification and which do not invade a constitutionally privileged area" is in and of itself ground for rejecting the applicant. And, he says: "An applicant might state with the utmost sincerity that he believed that such information was none of the committee's business; yet it must be clear that his application could be rejected." *Konigsberg*, pp. 311-312. We take it that this fairly states the issue and that Illinois, whether explicitly or not, has sought to bring its action within Mr. Justice Harlan's language.

Since Mr. Justice Harlan makes nothing turn on the character of the applicant, it makes it unnecessary for him to consider the issues thus far discussed. Of course, a state could have a rule that any applicant's failure to answer any question which does not invade constitutionally privileged ground, as marked out by this Court's latest decisions, would of itself be a basis for denying admission. We say nothing as to whether a State might properly refuse admittance to an applicant who refused to reveal his past addresses or matters of that sort, since it is scarcely realistic to suppose that an applicant would take such a position. But we do submit that a bare refusal to answer in the sensitive civil rights area cannot be made a valid ground for denying admission.

The vice in Mr. Justice Harlan's position, we submit,

is that it would set up an irrational classification. The present case will afford illustration. Faced with the Communist question, as posed by the Committee without any adequate foundation being laid, many applicants would answer readily enough, perhaps because they did not even appreciate that a question of privilege might be involved. A second group, although inwardly irritated, might swallow their indignation and answer. But a few hardy citizens, including Petitioner, would refuse to answer in a good faith belief that the questions were improper. Their applications would be denied, even though the Committee had been furnished with satisfactory evidence of moral character and good citizenship. Thus the rule, in operation, would discriminate between applicants on grounds perversely unrelated to their character and intellectual integrity. It would prefer illiteracy or servility to candor and independence.

A State, of course, may set up standards for admission to its Bar. But it requires no citation of authority to say that its regulations must be rationally designed to accomplish the State's purposes. A rule of admission which, in addition to requiring legal training and good moral character, insisted as well on a knowledge of carpentry, or on a certain avoirdupois—matters having no conceivable relation to the practice of law—would surely be stricken down as an unfair and irrational classification. So, too, it is submitted, must a court-imposed rule requiring an applicant to answer as in this case, or be denied admission, since it operates in reverse to exclude an able man with intellectual integrity.

The closest legal analogy which might be applied to justify a Committee on Character and Fitness in denying admission for a refusal to answer its questions is that of contempt. Indeed, the Illinois Court appears to have relied heavily on *Barenblatt* v. *United States* (1959), 360 U. S. 109.

It is true that a witness before a Congressional committee, for example, if he refuses to answer about any possible Communist ties, must do so at his peril. If the question is held to be proper, the witness's refusal, regardless of good faith, may be punished as the crime of contempt of Congress.

But the function of the Bar Committee is not to punish applicants but to pass on their qualifications as future members of the Bar. As Justice Bristow put it in his dissenting opinion: "That body is not an Un-American Activities Committee charged with investigating Communists, with power to require—indirectly—non-communist oaths on pain of denial of admission to the bar. Nor is it conducting a contempt proceeding with a denial of the right to practice law imposed as punishment for refusal to answer questions which the Committee regards as 'proper'." (Petition, Appendix, p. 74.)

It will be recalled that Justice Traynor in the second *Konigsberg* case was moved to suggest that in order to avert "grave danger to freedom of speech" the burden on sensitive issues should be shifted to the examiners. Perhaps, the Illinois Committee was given its subpoena forms virtually unused, for just such a purpose. At all events, we share Justice Traynor's concern and we suggest that the ambit of constitutional protection should not be strictly confined—as at a razor's edge—to only those questions which are clearly within the constitution, but that a penumbra should be recognized where good faith, non-frivolous objection in principle can be made without severe penalty. Only such a rule will be congenial to the traditions of an independent bar.

D. Authorities Distinguished.

Various cases have been cited and relied upon, by the Illinois Committee on Character and Fitness and the Illinois Supreme Court, as a basis for denying the Petitioner in this case, which seem to us to be clearly distinguishable.

In re Summers (1945), 325 U. S. 561, might seem relevant since this Court affirmed the action of Illinois in denying admission to its bar to a conscientious objector to military service. However, *Summers* was premised, as we noted above, on the erroneous assumption that the state court had full discretion in setting the conditions for admission to the Illinois bar. Further, the majority in *Summers* relied heavily upon the naturalization cases, *United States* v. *Schwimmer* (1929), 279 U. S. 644, and *United States* v. *MacIntosh* (1931), 283 U. S. 605, which were explicitly overruled in *Girouard* v. *United States* (1945), 328 U. S. 61, 69. For these reasons we submit that *Summers* is no longer a controlling precedent.

Again, *Kimm* v. *Rosenberg* (1960), 363 U. S. 405, might seem relevant since there an alien in a deportation proceeding, who refused to answer about Communist affiliations, was deemed to have failed to meet his burden of proof that he was eligible for a stay of deportation. However in *Kimm* the refusal to answer was keyed to a claim of the privilege against self-incrimination under the Fifth Amendment and the suspension of a deportation order was expressly held to be a matter "of administrative grace." There is, therefore, on two grounds a wide distinction between *Kimm* and the present case, where there is no claim of the Fifth Amendment privilege and where admission to the bar can scarcely be classified as a matter of administrative grace.

The wide difference between refusal to answer keyed to a claim of privilege under the Fifth Amendment and the refusal to answer in the present case also affords, we

think, a sufficient basis for distinguishing such cases as *Orloff* v. *Willoughby* (1953), 345 U. S. 83, *Lerner* v. *Casey* (1958), 357 U. S. 486, and *Beilan* v. *Board of Public Education* (1958), 357 U. S. 399. Further, *Orloff* involved the granting of a commission in the armed forces, and *Lerner* and *Beilan* involved public employment; hence, all three cases involved a status far different from admission to the bar, where the public interest requires qualities of independence and intellectual integrity.

Garner v. *Board of Public Works of Los Angeles* (1951), 341 U. S. 716. Here requirement of both a non-communist oath and an affidavit as to whether affiant is or ever was a member of the Communist party were upheld as conditions for employment by the City of Los Angeles. Refusal to take the oath or to sign the affidavit were held valid grounds for discharge. It might be urged that it would have made no difference to the result in *Garner* had petitioners shown that their refusal was keyed to a good faith objection in principle to the oath and the affidavit. Several distinctions between *Garner* and the present case should be noted, however. First, *Garner* again involved public employment, not admission to the bar; second, the issue of good faith objection in principle was not presented to the Court and was not passed upon by it; and, finally, the requirements in *Garner* were announced publicly and applied with an even hand to all applicants for public employment. The asking of the Communist question by way of oath in the case of all applicants may present quite different issues of constitutionality than does the singling out of a particular applicant and asking the question of him, all without prior notice, without laying any proper foundation for the question and without adequate warning of the consequences of a refusal to answer, as in the present case.

CONCLUSION.

In *Konigsberg*, Mr. Justice Black suggested that there were two possible routes by which a State might have barred an applicant who refused to answer a relevant question; it might have weighed the evidence on the question of moral character; or, it might have been applying a rule that refusal *per se* bars. This distinction is useful because the constitutional issues raised by the two routes are somewhat different. In the first instance the action may be invalid because it is an irrational judgment on the evidence; in the second, because the rule employs an arbitrary criterion for selection to the bar.

In the instant case, Illinois may have taken either of these two routes. Insofar as it acted by way of a judgment of fact, we submit that there is no basis on this record for its conclusion that the Petitioner failed to meet his burden of producing evidence of "moral character and good citizenship." Insofar as it acted by way of an implicit rule that the refusal to answer is in and of itself enough, we submit it was employing an irrelevant and irrational criterion for admission to the bar that could arbitrarily serve only to give preference to the servile over the independent and candid.

We submit, therefore, that however Illinois' action in denying George Anastaplo admission to its bar is interpreted, it was unconstitutional action under the Fourteenth Amendment. And we respectfully ask the Court to reverse the judgment below. In so doing, the Court will not only do justice in this case, but it will be vividly reaffirming for generations of applicants to come, the high place that

candor, courage, and independence of mind have as attributes of that character and fitness which make the lawyer.

Respectfully submitted,

HARRY KALVIN, JR.,
ROSCOE T. STEFFEN,
c/o American Civil Liberties Union, Illinois Division,
19 South La Salle Street,
Chicago 3, Illinois,
Counsel for Amicus Curiae.

FILE COPY

Supreme Court, U.S.
FILED
OCT 5 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 58

IN RE GEORGE ANASTAPLO,
Petitioner.

Brief on the Merits

GEORGE ANASTAPLO,
6030 Ellis Avenue
Chicago 37, Illinois
DOrchester 3-4825
Counsel pro se

Athens
July 4, 1960

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	3
Questions Presented for Review	3
Constitutional Provisions and Statutes Involved	6
Statement of the Case	9
1. 1950-1955	9
2. 1957-1960	10
3. First Session, February 28, 1958	12
4. Second Session, March 21, 1958	17
5. Third Session, April 7, 1958	25
6. Fourth Session, April 23, 1958	34
7. Fifth Session, May 19, 1958	38
8. Sixth Session, May 26, 1958	43
9. After the Sixth Session, May 1958 to January 1960	48
Summary of the Argument	57
Argument	62
Introduction	62
I. Due Process and Equal Protection	63
A. The significance of the record	63
B. The lack of a foundation and various "incidental" objections	72

PAGE

C. The relevance of the *Konigsberg* and *Schware* cases 79

II. Freedom of Speech and the Free Exercise of Religion 82

III. Toward a Truly Responsible and Law-Abiding Bar 87

Conclusion 90

TABLE OF AUTHORITIES CITED.*

Constitutional Documents.

Article I, Sec. 10, Const. 5

Article VI, Const. 86

Amendment I, Const. 5, 6, 14, 29, 37

Amendment XIV, Const. 5, 6, 7, 14, 29, 37

Article II, Sec. 4, Ill. Const. 83

Article V, Sec. 25, Ill. Const. 83, 86

Declaration of Independence 13, 29, 30, 46, 48, 71, 84, 85, 86

Cases.

Adler v. Board of Education, 342 U.S. 46 ..... 49, 72

Barenblatt v. United States, 360 U.S. 109 55

Beilan v. Board of Education, 357 U.S. 399 ..... 48, 49, 51, 54

Cantwell v. Connecticut, 310 U.S. 296 83

Clyde v. Gilchrist, 262 U.S. 94 67

* Various law review and other publications are referred to below in Notes 3, 19, 26, 28, 33, 34, 40, 54, 56, 58, 62, 69 and 75.

PAGE

Coleman v. Watts, 81 So. 2d 650 (Florida) 65

Communications Workers Assn. v. Douds, 339 U.S. 382 27

Cummings v. Missouri, 4 Wall. 277 ..... 49, 73, 86

Garland, Ex Parte, 4 Wall. 333 ..... 49, 73, 86

Garner v. Los Angeles Board, 341 U.S. 716 ..... 49, 72

Gitlow v. New York, 268 U.S. 652 83

Jordan v. DeGeorge, 341 U.S. 223 73

Konigsberg v. State Bar, 353 U.S. 252
3, 4, 10, 27, 49, 79, 80, 81, 83, 85, 87

Lerner v. Casey, 357 U.S. 468 ..... 48, 49, 51, 54

McCullough v. Maryland, 4 Wheat. 316 91

Murra, Application of, 166 F. 2d 605, 178 F. 2d 670 87

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 76

Schware v. Board of Bar Examiners, 353 U.S. 232
4, 10, 27, 49, 66, 67, 79, 80, 81, 82

Sweezy v. New Hampshire, 354 U.S. 234 74

Uphaus v. Wyman, 360 U.S. 72 55

West Virginia Board of Education v. Barnette, 319 U.S. 624 ..... 74, 83, 85, 86

Statutes.

Judiciary Code—28 U.S.C. Sec. 1257 3

Ill. Rev. Stat. 1951, chap. 13, par. 4 8

Ill. Rev. Stat. 1951, chap. 110, par. 259.58 (Ill. Supreme Court Rule 58) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 58

IN RE GEORGE ANASTAPLO,
Petitioner.

Brief on the Merits

Petitioner, George Anastaplo, who seeks correction of the denial of his application for admission to the practice of law in the State of Illinois, respectfully submits this Brief on the Merits.

Opinions Below.

On June 12, 1957, the Committee on Character and Fitness of the First Appellate Court District of Illinois (sitting in Chicago) denied petitioner's request for rehearing of his application for admission to the Illinois bar, but not without granting him leave to file a supplementary petition for rehearing with answers to two interrogatories posed by the committee. Upon receipt of petitioner's responses (of June 25, 1957) to these interrogatories, the committee promptly declined (July 2, 1957) to grant petitioner a rehearing, Commissioners Rothschild and Sawyier dissenting.

Upon appeal, the Supreme Court of Illinois on September 17, 1957 ordered the character committee to conduct the requested rehearing. The committee, almost a year after completing the rehearing ordered by its court, refused on April 9, 1959 to recommend petitioner for admission to the bar. The committee divided 11-6 and majority and minority reports were filed in the Supreme Court of Illinois.

Upon appeal again, the Supreme Court of Illinois affirmed on November 19, 1959 the decision of the committee majority, with Mr. Justice Bristow filing a dissenting opinion. On January 21, 1960, the court below denied a petition for rehearing, with two additional members (Mr. Justice Schaefer and Mr. Justice Davis) filing a dissenting opinion. (18 Ill. 2d 182, 163 N.E. 2d 429) An attempt on the part of petitioner to "settle out of court" without sacrifice of principle resulted in a fruitless exchange of letters with the committee in February, 1960.

The various opinions, orders, reports and letters that have been referred to here are set forth in the Appendix to the Petition for a Writ of Certiorari filed by petitioner in this Court March 18, 1960 (hereafter cited as "Appendix,

Pet. Writ. Cert."). Petitioner's Supplementary Petition for Rehearing (of June 25, 1957), which advised the committee what petitioner's position would be in the event of a rehearing, is set forth in the printed record at R. 484. Petitioner's examination before the committee is reproduced in its entirety in the printed record at R. 2-366.

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered November 19, 1959. Timely petition for rehearing was filed December 3, 1959 and denied January 21, 1960.

A writ of certiorari was petitioned for under 28 U.S.C. §1257, a title, right, privilege or immunity having been specially set up or claimed under the Constitution. On May 2, 1960, this Court entered the following order, "The petition for writ of certiorari is granted and the case is set for argument immediately preceding No. 661 [*Konigsberg* v. *State Bar of California*]."

Questions Presented for Review.[1]

1. Has petitioner been deprived of liberty and property, in violation of the due process and equal protection clauses of the Fourteenth Amendment, by being excluded from the bar

(a) because of the refusal of the court below and its character committee to give proper recognition to the record as a whole, a record which is overwhelmingly favorable to petitioner, in passing upon his character and fitness for admission to the bar?

[1] The questions have been arranged to conform as much as possible to the order of discussion in the Argument.

(b) because of his refusal on principle to answer political affiliations inquiries, the foundation of which inquiries in and the relevance of which to this proceeding have not only never been established but have even been denied by the explicit admission on the part of the Illinois bar authorities that they have absolutely no evidence linking petitioner with any so-called "subversive" organizations?

2. Do the decisions in this case by the court below and its character committee, which deny petitioner admission to the bar despite his evident qualifications to practice law, conform to the standards with respect to due process of law and to equal protection of the laws under the Fourteenth Amendment laid down for bar admission matters by this Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, and *Konigsberg* v. *State Bar*, 353 U.S. 252?

3. May a conscientious refusal, on plausible constitutional grounds, to answer questions about political affiliations be treated as evidence adverse to an applicant for admission to the bar without infringing upon the due process guarantee of the Fourteenth Amendment?

4. Has petitioner been deprived of liberty and property, in violation of the due process and equal protection clauses of the Fourteenth Amendment and of the *ex post facto* clause of the Constitution, by the attempt of the Illinois authorities to devise a "brand new exclusionary rule" whereby his refusal to answer any question put by a member of the character committee constitutes grounds for exclusion from the bar, especially when the refusal to answer these questions came early in the proceedings and did not put an end to a lengthy examination of petitioner and when only a few of the many unanswered questions are now referred to by the committee as justifying exclusion?

5. Has petitioner been deprived of liberty and property, in violation of the freedom of speech guarantees of the First and Fourteenth Amendments, by being excluded from the bar

(a) because of the expression of legitimate opinions about the right of revolution and the Declaration of Independence?

(b) because of his long-standing refusal on principle to answer questions about his political affiliations and religious beliefs?

6. Petitioner's views as to what are relevant, necessary or permissible inquiries of applicants for admission to the bar are shared neither by the court below nor by its character committee. Nevertheless, petitioner cannot, in good conscience and with due regard for the common good, submit to such inquiries even should the making of these inquiries into his political affiliations or associations be deemed permissible for bar admission proceedings under the Constitution. He has referred to eminent Americans of unquestioned character and good citizenship who have supported positions similar to his. His refusal is presented as a form of protest against such inquiries and proceedings and against the test-oath-like nature of the situation with which he has been confronted.

Is such a protest or refusal, especially when petitioner has otherwise sustained the burden of proof as to his character, fitness and good citizenship and when the sincerity of his position is not challenged, protected by the First and Fourteenth Amendments as an exercise of the right to freedom of speech for which no penalty, such as exclusion from the bar, may be exacted by a State?

7. Would not petitioner's exclusion from the bar, even if he were now shown to be a member of the Communist Party or of the Ku Klux Klan, be unjustified on the record in the face of the guarantees of freedom of speech in the First Amendment and of due process of law and equal protection of the laws in the Fourteenth Amendment? If so, can he be properly denied admission to the bar when all he has done is to refuse on principle to answer questions about such memberships, especially after the admission by the Illinois authorities that there is absolutely no evidence linking him with any "subversive" organization?

8. Aside from the effect of other constitutional limitations upon state action, does this Court have the power to examine, for their wisdom as well as their reasonableness, the methods and standards employed in the state courts which supply the bar of this Court and to correct state action which excludes an applicant qualified to practice both in his State and before this Court? If such power exists, should this Court exercise it in this instance to provide for the admission of petitioner to the Illinois bar or, at least, to the federal bar and the bar of this Court?

Constitutional Provisions and Statutes Involved.

The provisions of the Constitution of the United States involved are as follows:

> No State shall . . . pass any Bill of Attainder [or] *ex post facto* Law . . .
>
> Article I, Section 10

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> Amendment I

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Amendment XIV

The appropriate parts of the statutes involved are as follows: Rule 58, Section IX, Rules of Practice and Procedure of the Supreme Court of Illinois; Ill. Rev. Stat. 1951, chap. 110, par. 259.58, IX:

> 1. At the November term in each year, the Supreme Court shall appoint a Committee on Character and Fitness in each of the Appellate Court Districts of this State, consisting of not less than three members of the bar. . . .
>
> 2. Before admission to the bar, each applicant shall be passed upon by the Committee in his district as to his character and moral fitness. He shall furnish the Committee with an affidavit in such form as the Board of Law Examiners shall prescribe concerning his history and environments, together with the affidavits of at least three reputable persons personally acquainted with him residing in the county in which the applicant resides, each testifying that the applicant is known to the affiant to be of good moral character and general fitness to practice law, setting forth in detail the facts upon which such knowledge is based. Each applicant shall appear before the Committee of his district or some member thereof and shall furnish the Committee such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the bar.
>
> 3. If the Committee is of the opinion that the applicant is of approved character and moral fitness,

it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar.

Ill. Rev. Stat. 1951, chap. 13, par. 4:

> Every person admitted to practice as an attorney and counsellor at law shall, before his name is entered upon the roll to be kept as hereinafter provided, take and subscribe to an oath, substantially in the following form:
>
> I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States and the constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of attorney and counsellor at law to the best of my ability.

The Rules of the Committee on Character and Fitness for the First Appellate Court District of Illinois (adopted September 1, 1939) are set forth in their entirety at R. 366-370.

STATEMENT OF THE CASE.

1. 1950-1955.

Petitioner began the study of law in 1948 at the University of Chicago Law School, eighteen months after completion of his wartime service as an Air Force navigator officer.[2] His 1950 application for admission to the Illinois bar was denied by the Chicago Committee on Character and Fitness in 1951, a denial affirmed by the Illinois Supreme Court in 1954 (3 Ill. 2d 471, 121 N.E. 2d 826).

Both the court and the committee stressed as justification for their action petitioner's views on the right of revolution as well as his refusal on principle to answer questions about possible membership in any political organization. This Court, with two members dissenting, refused in 1955 to review the Illinois action (384 U.S. 946, 349 U.S. 903, 908.)[3]

---

[2] Petitioner was born in St. Louis, Missouri, November 7, 1925, grew up at Carterville, Illinois, and received most of his higher education at the University of Chicago after his United States Air Force Service in the Pacific, Europe, North Africa and the Middle East. (He retained his Air Force commission until a reorganization of the Reserve after the Korean War.) He is married and the father of three children. Petitioner is presently serving as Lecturer in the Liberal Arts and Research Associate in University College, The University of Chicago. (This, and similar, information is recorded in the standard questionnaire and in petitioner's letter of March 27, 1958. (R. 371-385, 108-120)

[3] Petitioner's 1955 Jurisdictional Statement in the Supreme Court of the United States (January 11, 1955), pp. 9-17, presents a careful summary of the initial examinations of petitioner by the Committee on Character and Fitness in 1950-1951. A substantial part of the record made at that time on which the 1954-1955 appeal was based is reproduced in London, "Heresy and the Illinois Bar: The

2. 1957-1960.

A renewed application for admission to the bar was filed by petitioner with the character committee in 1957, after this Court's decisions in the *Schware* and *Konigsberg* cases, 353 U.S. 232, 252. The committee refused to consider this application after inquiring of and learning from petitioner that he still held his former views with respect to the right of revolution and that he must continue to refuse to answer any questions about his political affiliations and associations.[4]

Petitioner appealed this 1957 decision of the committee to the Supreme Court of Illinois. That court ordered the character committee to conduct a rehearing, specifying the questions on which evidence should be taken:[5]

> The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of*

Application of George Anastaplo for Admission," 12 Lawyers Guild Rev. 163 (1952). Citations to law review and other comments on the 1950-1955 phase in the case are collected in Note 1, Petition for a Writ of Certiorari (March 18, 1960). Professor Malcolm Sharp's extended comment on the early phase in the case is set forth in the printed record. (R. 475-484) Petitioner's 1954 Brief in the Supreme Court of Illinois provides a comprehensive analysis of loyalty-oath proceedings in bar admission matters. This 115-page brief was filed in this Court as an exhibit with the 1955 Jurisdictional Statement.

[4] Appendix, Pet. Writ. Cert., 1; Petitioner's Supplementary Petition for Rehearing, June 25, 1957. (R. 484-490)

[5] Appendix, Pet. Writ. Cert., 7. This language seems to have been adapted from Commissioner Rothschild's 1957 dissenting opinion (Appendix, Pet. Writ. Cert., 2, 6) and seemed also, in this context, implicitly to rule out any further questions about petitioner's possible affiliations. See Section 2, petitioner's 1959 Brief in the court below (filed as part of the record with the Petition for a Writ of Certiorari). See, also, R. 61-62, 70.

California, 353 U.S. 252, and *Yates* v. *United States*, 1 L. ed. 2d 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.

We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence *on these matters*, and the Committee is requested to do so, and to report the evidence and its conclusions. [Italics added.]

In obedience to this directive, more than twenty hours of testimony were taken from petitioner by the full committee between February and May 1958 (R. 2-366) and a dozen character affidavits and references were put in the record (R. 386-414). Another year passed, however, before the committee was ready to announce its decision, once again refusing to certify petitioner for admission to the bar. The committee filed with the court below at that time a report explaining its decision. Of the seventeen members of the committee, eleven signed this adverse report; six commissioners signed a minority report recommending admission. (Appendix, Pet. Writ. Cert., 8, 28)

The court below affirmed its committee's decision on November 19, 1959 and, after a petition for rehearing, on January 21, 1960. Of the seven members of that court, four joined in the *per curiam* opinion upholding the committee majority; three justices filed two dissenting opinions recommending admission. (18 Ill. 2d 182, 163 N.E. 2d 429; Appendix, Pet. Writ. Cert., 34, 53, 78) It is of this decision and decree by the court below that review by this Court has been secured.

The facts in this case consist, to a large extent, of a debate between members of the committee and petitioner that runs through the six sessions that are recorded in

four hundred pages of transcript.[6] Perhaps the fairest and most effective way of presenting the facts is to set forth in a connected narrative some of the highlights of this debate in petitioner's six appearances before the character committee during the current rehearing. It is for that reason that this Statement of the Case takes the form it does.[7]

3. First Session, February 28, 1958.

The examination of petitioner before the full committee (during the current 1957-1960 phase) began with a review and elaboration of various items on the standard applicant's questionnaire which petitioner had been required to fill out, items relating to his education, military service, travels abroad, employment, legal studies, publications and civic activities. This part of his examination lasted about forty-five minutes (R. 22).

The next stage featured inquiries about organizations to which petitioner might belong.[8] Petitioner was asked about and denied membership in various veterans' or-

---

[6] The entire transcript is reproduced in the printed record. (R. 2-366.)

[7] The reader of the excerpts that follow might find it convenient to be able to check immediately the final vote of various of the participants. The commissioners who voted against petitioner were Mr. D. Robert Thomas (Chairman), Mr. Charles A. Bane, Mr. Richmond M. Corbett, Mr. Walter H. Moses, Mr. John M. O'Connor, Jr., Mr. Francis J. Seiter, Mr. Len Young Smith, Mr. Robert A. Sprecher, Mr. Edmund A. Stephan (Chairman of the Sub-committee), Mr. Jerome S. Weiss, Mr. Horace A. Young. The commissioners who voted for petitioner were Mr. James P. Carey, Jr., Mr. J. R. Christianson, Mr. James E. Hastings, Mr. George N. Leighton, Mr. Edward I. Rothschild (Vice-Chairman), Mr. Calvin P. Sawyier. (Appendix, Pet. Writ. Cert., 28, 33)

[8] Commissioner Bane had been assigned by the committee to conduct this part of the examination (R. 3, 22). Commissioner Carey had been assigned to conduct the examination relating to character and fitness in the usual sense (concluding at R. 22).

ganizations, alumni organizations and civic organizations (R. 27). There then followed the first question relating to possible membership in a political organization that petitioner was obliged to refuse to answer,[9] the "foundation" for which question having been laid in this manner (R. 27-28):

> Commissioner Bane: Have you, since 1951, become a member—let me ask you first of all, you are of Greek descent, Mr. Anastaplo?
>
> Mr. Anastaplo: That is true.
>
> Q. Your father and mother were both Greek?
>
> A. Greek descent, yes.
>
> Q. Since 1951, have you become a member of any nationality organization related to Greek Americans or the Greeks who were in this country?
>
> A. No, I have not.
>
> Q. Are you a member, for example, of Ahepa?
>
> A. No, sir.
>
> Q. Are you familiar with the list of organizations which have been designated by the Attorney General as subversive?
>
> A. I am familiar with the fact that some have been designated by the Attorney General, and I know of some that are on the list, but I am not familiar with the list itself.
>
> Q. Let me ask you, bearing in mind your Greek descent, whether you are a member of an organization which has been designated by the Attorney General as subversive, known as the American Council for a Democratic Greece?
>
> A. I have already answered a question about nationality groups. And I have answered other ques-

[9] Petitioner had indicated earlier that he would, in the event of a rehearing, maintain the position he had held since November 10, 1950: that is, he would continue to defend the Declaration of Independence and the right of revolution and he would continue to refuse to answer questions about political affiliations (including inquiries about the Communist Party and the Ku Klux Klan). Petitioner's Supplementary Petition for Rehearing, June 25, 1957. (R. 484-490)

tions about groups—so long as they were—so long as I could in any way tell myself this was not a question involving political activity. Now, since you seem to want to put it in those terms, I simply have to call a halt to my answering that kind of question.

Petitioner was asked his grounds for refusing to answer "that kind of question." He recited objections based on the First and Fourteenth Amendments and on the *ex post facto* and bill of attainder clauses of the Federal Constitution. He also noted that he did not believe the term "activities", in the Supreme Court of Illinois order which had decreed the rehearing, was intended to include political affiliations.[10] He then stated, in response to further questions, that he was under no coercion to take the position he did, that his position was not taken because of any fear of perjury indictments if he answered one way or another, and that it was a position that did not rely upon the Fifth Amendment to the Federal Constitution (R. 30-32). The examination continued (R. 32-34):

Commissioner Bane: Let us proceed now, and let me ask you whether, if I had not indicated to you that the American Council for a Democratic Greece is on the Attorney General's list, and if you had not known whether it was or not, would you have been willing to answer the question as to whether you were a member of that council?

Mr. Anastaplo: Probably, in the sense that I—

Q. Probably yes, you would have been willing to answer?

A. In the sense that I do not want to make it appear, and I would bend over backwards not to make it appear, that I am in any way obstructing the action of the committee, the function of the committee, or simply raising objections on technical points, or even not technical ones, when they might not be altogether

[10] See Note 5 (this Brief).

appropriate. Let me say this. One can argue that some of the other questions I answered were perhaps inappropriate. One can argue that. And if one wanted to be technical, perhaps one would have to argue it. But I simply want to lean over backwards to indicate that I would like to be as cooperative with this committee as possible. And since I am really ignorant—I have already told you—I am really ignorant of most of the names on that list, you could probably name a dozen of them right now, and I could not begin to tell whether they are on the list or not—I would probably cooperate to some extent in answering some of them, if I could in good conscience say to myself that I didn't know whether it was on the list. But if I know it's on the list, and I know that you are asking it off the list—I mean, this is all very vague perhaps to you—but if I know that somehow it had something to do with this kind of inquiry, the kind that I have been opposed to for seven years, then in good conscience I would have to refuse. You can take advantage of my ignorance if you like, but certainly it is ignorance, of what is on the list.

Q. Well, now, I am not taking advantage of your ignorance, as we have not done, because we have been frank with you—

A. That is true.

Q. —in indicating the organizations which are on the list. I now want to read the names or titles of certain other organizations which are on the list, according to the information that we have, and I want to ask you whether you have become a member of that organization since 1951, and in each case whether you are a member of it now.

A. May I ask first, why—does this committee care to say why they want to know?

Q. No, I want to ask the question, and then I want to get your answer.

A. May I ask another question if you don't want to answer that one?

Q. Mr. Anastaplo, you are being questioned, you are the applicant; you understand that?

A. But cannot—could not counsel ask the relevance of the inquiry that is being made?

Q. I don't believe that the committee is going to permit you to put on two hats, and be a witness one minute and—

A. Cannot I ask, then, the relevance of the inquiry?

Q. I will refer the matter to the chairman of our subcommittee, but it is my view that you are the witness and that your function today is to answer questions, and not to ask them.

As Commissioner Bane prepared to ask about petitioner's possible membership in various organizations designated by him as on "the Attorney General's list", petitioner was permitted to object "that there has been no showing or indication to me here, or by any other means, either of the developments [11] of the question, or the validity of the list, or any showing that the list was devised for any purpose that relates to the purpose of this inquiry." (R. 34-35) Nevertheless, petitioner was thereupon asked questions which he refused to answer about possible membership in The Abraham Lincoln School of Chicago, the Civil Rights Congress for Texas, the Council for Greek Americans, the Ku Klux Klan, the Silver Shirts of America, and the American Youth for Democracy, all of which were said to be organizations on "the Attorney General's list." (R. 42-43)

To all these questions, as well as the subsequent one about whether he was then or had ever been a member of the Communist Party (R. 37-38), petitioner raised his constitutional objections under the First and Fourteenth Amendments. In addition, he offered the committee evidence with respect to the Communist Party question that it had

[11] *I.e.*, foundation for or relevance of. (R. 35)

never been thought either by the committee or by the Supreme Court of Illinois that petitioner was a Communist (R. 38-39). Petitioner pointed out that this evidence was not to be taken for his answer to this question but rather as casting light on the good faith and purpose of the present inquiry about Communist Party membership.[12] The committee, after a recess for deliberation in executive session, refused to ask for this evidence (R. 43-44). The substance of this evidence was acknowledged in the fifth session by the committee when it was induced to concede (R. 234),

> . . . no one has stated [orally or in writing] to this Committee that you are or have ever been a Communist or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the organizations or any of the organizations listed as subversive by the Attorney General's list . . .

4. Second Session, March 21, 1958.

Petitioner's second appearance before the committee was devoted for the most part to an examination of the extent of his commitment to constitutional government. The passages set forth below serve to indicate the nature of the discussion.

> Commissioner Bane: I want to call your attention to question 19(c) on the questionnaire, which asks: "State what you believe are some of the obligations of good citizenship." Your response is as follows: "In addition to the answer given in my questionnaire of October 26, 1950, I should like to emphasize the obligation of a good citizen to 'honestly strive against the many lawless and unrighteous deeds which are done in a state.'" . . . I am asking you if you will give us examples of lawless and unrighteous deeds which you would strive against.

[12] Letter to the committee, March 3, 1958 (R. 61, 64); Closing Argument. (R. 335-336.)

Mr. Anastaplo: I suppose a lawless deed would be a corruption of officials in a city, against which one might take action, by legal action or other means.

Q. How about unrighteous deeds?

A. The most striking example that comes to my mind is the action of this committee the last seven years.

Q. Taking the action of this committee as an example of an unrighteous deed, how would you conceive that you ought to strive against it?

A. First by refusing to bow before the men of the committee in the course of the examination, and thereupon to take action necessary when the decision has been rendered.

Q. Is there any other way in which you might strive against it?

A. I might tell a few people about it, and try to persuade them this sort of thing is not desirable.

Q. What would you expect them to do after you had told them about it, or what, if anything, would you urge them to do?

A. To think about it, and reflect upon what it means to a society that permits such things to happen.

Q. Would that be the end of what you would hope or expect to do?

A. That is practically what I have done.

Q. You haven't answered the question. Is that the end of what you would hope or expect to do?

A. That is about it.

Q. Would you urge them to any action of any kind?

A. Probably not; simply a matter of expressing my views on the subject and letting people know about it generally. (R. 75-77)

Neither petitioner nor Commissioner Bane could supply any examples in contemporary America of lawless deeds which a citizen would be entitled to strive against "by action which the State itself deems to be lawless" (R. 78).

In response to subsequent inquiry, petitioner affirmed that he did and would continue to support the Constitution

of the United States, that he adhered to the division of governmental powers as set forth in that constitution, and that he supported "the provisions in the Federal Constitution with respect to federalism"[13] (R. 81). But he refused to answer Commissioner Bane's question (R. 81):

> Do you have any belief that ultimately in this country there will be no need for a Federal Constitution, by reason of the class struggle which will lead to the ultimate disappearance of the state? . . . I mean "sovereign state", and the reference to the class struggle and ultimate disappearance of the state is a shorthand reference to the principles of Marx and Lenin.

Instead of answering, petitioner stated his objections to such questions, likening them to questions about political affiliations. In the course of these objections, Commissioner Bane restated his question about the "need for a Federal Constitution," insisting that petitioner should not take into account the fact that Marx and Lenin had been mentioned in the earlier formulation of the question (R. 84):

> Commissioner Bane: Do you believe that a time will ever come when there no longer will be a necessity in the United States for the Federal Constitution—pe-

---

[13] Petitioner had answered, in response to the questionnaire request that he "State what you understand to be the principles underlying the Constitution of the United States",

> One principle consists of the doctrine of the separation of powers; thus, among the Executive, Legislature and Judiciary are distributed various functions and powers in a manner designed to provide for a balance of power and to prevent totally unrestrained action by any one branch of government. Another basic principle is that such government is constituted so as to secure certain inalienable rights, those rights to Life, Liberty and the Pursuit of Happiness (and elements of these rights are explicitly set forth in such parts of the Constitution as the Bill of Rights). And, of course, whenever the particular government in power becomes destructive of these principles and ends, it is the right of the people to alter or to abolish it and thereupon to establish a new government.

(Questionnaire item 19(a), R. 381-382)

riod. That is all there is to it, end of the question.

Mr. Anastaplo: And in answer to the question, I am to disregard anything else you have mentioned?

Q. You have heard the question.

A. Is that assumed? I would say no, I don't think it is very likely that the Federal Constitution—that the need for the Federal Constitution will be superseded.

Q. Does that mean, then, that you do not subscribe to the Marxist-Leninist doctrine that as a result of a class struggle there will be a disappearance of the state, and consequently a disappearance of any need for a written document concerning the government of that state?

A. And that I refuse to answer, on the grounds that I have just indicated . . .

These grounds included references to the free speech provision of the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment, which grounds petitioner proceeded to set forth in detail (R. 85-92).

Commissioner Bane concluded his principal examination of petitioner in the following exchange (R. 93):

Commissioner Bane: Bearing in mind the provisions of the Federal Constitution defining and ascribing generally the powers of the executive and legislative branches of the Federal Government, I would like to ask you whether you consider that form of government preferable to government by presidium, such as exists in the Soviet Union?

Mr. Anastaplo: I refuse to answer the question, on the same grounds that I have indicated.

Q. Are you modifying or withdrawing, in any sense, your answer to question 20 [of the applicant's questionnaire], that you do now without any mental reservation and will hereafter loyally support the Constitution of the United States?

A. I am not. I have answered that question.

Q. Are you taking the position that having answered that question, this committee has no authority to inquire into any specifics or details concerning the meaning of your answer?

A. That is not what I am talking about. The position I am—

Q. What is your position?

A. The position I am taking is that the committee has no authority to use unconstitutional means to check —that is what I mean by that answer.

As the session drew to a close, Commissioner Stephan thought it advisable to inform petitioner "as to what *we*[14] mean by a member of the Communist Party" in the hope that it might "make it easier for you to respond to future questions" (R. 101):[14]

> Commissioner Stephan: '*Now what I mean when I ask the question is this*: By a communist *I mean* a member of the Communist Party; *I mean* a person who is a disciplined, active member of that Party; *I mean* a person who believes in communist doctrine and goals. Among these are class warfare, putting an end to representative government, putting an end to civil liberties, suppressing religion, in effect destroying constitutional government as we know it in this country. These goals are accomplished by force, when necessary, by fraud and subversion, they will be accomplished by violence as soon as it is expedient to use violence. Peaceful, democratic, constitutional avenues for attaining these goals are not utilized.

Commissioner Stephan, after asserting that there was "a contradiction in . . . an applicant saying he will support the Constitution of the United States and the Constitution of the State of Illinois, and at the same time be imbued with the views, the programs, the goals that *I have attrib-*

[14] Italics added throughout.

uted[14] to a communist", gave petitioner the following notice (R. 102-103):[14]

> Commissioner Stephan: Now you have asked for a warning when we put a question to you we think is a pivotal, important question in connection with your qualification. I must tell you that we consider that question, "Are you a member of the Communist Party," such a question; and that the refusal to answer it may have serious consequences to your application. *I am not pre-judging you in this regard, and I haven't the slightest idea how any other member of the committee is going to vote on this proposition. I have not, for that matter, made my own mind up as to how I am going to vote.* But I can see that it would well be an important question in dealing with your application. I want you to understand that. That is not a frivolous position. I think it needs to be treated very seriously. Do you want to make some statement?
>
> Mr. Anastaplo: Yes, I would like to find out exactly what this entails. You are not suggesting that refusal to answer that question would *per se* block my admission to the bar?
>
> Commissioner Stephan: No, I am saying your refusal to answer that question as to whether you are a member of the Communist Party, could and might.
>
> Mr. Anastaplo: I see.

Petitioner responded to Commissioner Stephan's declaration with the following inquiry (R. 103):

> I assume that the committee does not care to state why this is a particularly serious issue with respect to me? I mean—I notice you say nothing about the Ku Klux Klan or the Silver Shirts of America, about which you have also asked with the same amount of emphasis up to this point, and which I have refused to answer [questions about] for the same reasons. Would you care to indicate why you say this about this question and not about the other ones?

---

[14] Italics added throughout.

Commissioner Stephan suggested that the history of petitioner's case was important in assessing what questions should be stressed by the committee. Petitioner observed that the history of the case included his refusal in 1951 to answer questions about the Ku Klux Klan as well as about the Communist Party: if the criterion was that a question had been asked before and not answered by petitioner, he argued, the Ku Klux Klan question seemed to qualify as much as the one about the Communist Party for inclusion in Commissioner Stephan's attempted warning (R. 103-104).

The examination of petitioner during this second session before the character committee concluded with inquiries as to his opinion about the eligibility of a member of the Communist Party for admission to the bar (R. 105-107):[15]

> Commissioner Stephan: [A Communist] is a person who believes in class warfare, who believes in the destruction of constitutional government, he believes in the abolition of private property, the suppression of religion, he follows a line dictated by a foreign government, and, if necessary, he will accomplish his goals by violence. Let us assume we have credible proof of such views by an applicant from an outside source. Would you say that we should or should not admit such a person to membership in the bar?
>
> Mr. Anastaplo: I would not care to make a judgment simply on that because these things seem to me, as you relate them, largely theoretical and have no application to one's daily life.

[15] This inquiry, about the eligibility of the Communist for admission to the bar, was the one with which this case opened on November 10, 1950. Petitioner's "wrong" answer to this inquiry led to an examination of his views about the right of revolution and thereupon to inquiries into his affiliations. (Closing Argument, R. 330-331.) *Cf* Note, 50 Northwestern Univ. L. Rev. 94, which sees the starting point (for the 1950 committee's inquiries into petitioner's possible political affiliations) in the questionnaire item reproduced in Note 13 (this Brief).

Q. I said he was an active member of the Communist Party.

A. Yes, but you proceeded to indicate what that activity refers to, in terms of very long-range goals that the Communist Party is assumed to have. And that would not be sufficient. A man may believe in an organization that intends someday to punish the wicked, reward the good, destroy the earth, remove all constitutional government from this earth. That is a church organization, and that may be just as far-fetched as the communist one.

Q. Are you attempting to say that even though a man has these goals, and is actively working towards them with others, that in determining whether he should be admitted to the bar we should first decide whether those goals are likely to be accomplished immediately or whether they are long term?

A. That would certainly be a relevant consideration.

Q. Are you thinking about clear and present danger problems; is that the point you are making?

A. That, of course, may be related. I am mostly thinking about a reasonable evaluation in the matter. That is to say, a man who believes in the kingdom of the proletariat and a man who believes in the Kingdom of God upon Earth, may both be visionaries, whose actions and goals have no immediate relation to everyday political life and work as a member of the bar.

• • •

Q. I say, he wants to put an end to representative government and he believes in dictatorship of the proletariat. Wouldn't you say he plans to put an end to representative government as we know it?

A. I am saying that that may be part of a long-run theoretical goal.

Q. Let's assume it is. Can you say such a man can take the oath to support the Constitution of the United States and the Constitution of the State of Illinois?

A. Certainly, as much as to say a devout Christian can take the oath to support the Constitutions of the United States and Illinois, even though he is bent by his efforts on establishing the Kingdom of God on Earth.

Q. Don't you think when you swear to support the Constitution of the United States and the Constitution of the State of Illinois that you have a belief in a certain minimum amount of representative government, a certain minimum amount of civil liberty, a certain amount of power reserved to the people?

A. Certainly, and both Christians and communists do, perhaps; they may have that belief in representative government in the practical and immediate future. That is why I do not think that one can make a judgment beforehand, before he knows more about the situation.

Q. So you are saying you see no essential incompatibility in being an active, disciplined, militant Communist Party member, and the taking of the oath required of Illinois attorneys?

A. Not necessarily, yes, sir. . . . May I also add, sir, that I may be completely wrong [in these opinions about the eligibility of Communist Party members], but I would insist that these opinions I am now expressing would have no bearing on my character and fitness. [16]

5. Third Session, April 7, 1958.

The session opened with the committee denying two motions petitioner had presented March 27, 1958 in a letter of objections to the committee's conduct of the inquiry (R. 121-122, 118-119):

I move that the committee now rule, on the basis of the objections I have raised, that my responses or lack of responses at any time in the course of this rehearing, to the inquiries about affiliations, as well

[16] Here, as elsewhere, the bracketed words have been added to make clear the intended meaning of the passage.

as to the inquiries about Marxist or Leninist doctrines, should have no adverse bearing on my application.

I further move that the committee rule that no further inquiries into affiliations be permitted, or any other inquiry related thereto.

Petitioner subsequently filed with the Committee a document entitled, "Remarks by George Anastaplo, prepared for presentation to the Committee on Character and Fitness at the beginning of the meeting of April 7, 1958" (R. 128, 426-432). This document was an extended comment on Commissioner Stephan's remarks toward the close of the second session on the nature of the Communist Party and on the relation of those remarks to petitioner's matter. The paper, anticipating some of the discussion in this third session, explained why an applicant was not bound to accept Commissioner Stephan's characterization of the Communist Party, asked for some indication why the Communist Party inquiries should be now made so much of in petitioner's case, and included the following challenge to the committee (R. 429-430):

Thus, the bearing of this question about the Communist Party on my matter is in no way indicated. All I have instead is Mr. Stephan's personal dissertation about the doctrines and goals of the Communist Party and why he is opposed to it. For all you know, I may be opposed to it for the same reasons. But that is not the issue here. Mr. Stephan is dubious, to say the least, about the qualifications of a Communist Party member because that member's goals and doctrines probably include, among others,

1. putting an end to representative government;
2. putting an end to civil liberties;
3. destroying constitutional government.

> As between the Committee and me, who has stood firmest for constitutional government, for the rule of law, for civil liberties? Who has not only spoken for these principles but made sacrifices on their behalf. Have I not exhibited enough of a commitment to these principles to make unnecessary and presumptuous any attempt to check up on me indirectly with inquiries about affiliations? Have I not shown that my entire position before the Committee is based on these principles, principles which I have spelled out in detail for many years now? Have I not already demonstrated a strong enough attachment to constitutional law, to the rule of law, and to civil liberties? If Mr. Stephan is correct in his description of the goals of the Communist Party, I suggest that this Committee, in the way it has handled my application for admission the past eight years, has served admirably the goals of Mr. Stephan's Communist Party.

A discussion of constitutional problems followed, with the chairman of the committee advancing *Communications Workers Association* v. *Douds*, 339 U.S. 382, as bearing on petitioner's matter and with petitioner, after pointing to the *Schware* and *Konigsberg* cases as much more relevant for bar admission purposes, stating that (R. 135),

> I do not agree with the majority opinion in the *Douds* case. I would point to the dissents in the *Douds* case, and say, "That is where I stand." Am I ineligible because I take the dissents of certain members of the Supreme Court seriously? Furthermore, Mr. Stephan, and I think this is a serious problem I am about to bring up, there has been no showing at any time in the course of these seven or eight years, why these questions or inquiries as to communist affiliations have any bearing upon my application; why is it important in my case; what have I

done, what have I said, what do you know about me, that makes it important to emphasize, as you did at the end of the last session, questions about communism?

Commissioner Young, in an attempt to justify the special emphasis that had been given the Communist Party questions, opened the following exchange (R. 136):

> Commissioner Young: Mr. Anastaplo, if you are permitted to practice law, some day you may be on a case opposite me. I want to know whether or not I must, in my practice of law, deal with lawyers who are members of the Communist Party and who do not regard their oaths—
>
> Mr. Anastaplo: Let me ask you, sir—
>
> Q. No. You answer my question.
>
> A. Yes, sir, I appreciate your problem.
>
> Q. Well, why don't you answer it, then?
>
> A. But then—I will tell you why. Because I think you should also want, as your opponents and as your colleagues in the bar, men who stand on principle. And I further ask you, sir, whether you have seen anything from me, or heard anything from me, either in the present record or that of the last seven or eight years, which would indicate I would not take my oath seriously, or I would take unfair advantage of you if I were your opponent in a court of law?

At this point, Commissioner Young asked petitioner, "Do you believe in a Supreme Being?", going on to defend this question as appropriate because of the oath taken by petitioner at the beginning of the rehearing (R. 137).[17] Petitioner objected to and refused to cooperate with this line of inquiry into his religious beliefs, adding that (R. 137),

> . . . this is a settled problem you are dealing with, the problem of the relation of a [belief in] a Supreme

[17] "Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?" (R. 2)

> Being to the validity of one's oath. I submit to you that this problem has been settled in a formal sort of way by Anglo-American law, about a hundred years ago.

After further constitutional discussion, Commissioner Stephan announced that the inquiry would turn to petitioner's "belief in the right of overthrow." (R. 145) Petitioner immediately stated that he had several objections to inquiry along these lines (R. 145),

> . . . objections [that] are based on the premise that I have shown and I am willing to show my willingness and ability to take the oath of office for attorney in good faith, and that no indication has been given as to why I should be questioned further along this line.

He then stated objections based on the freedom of speech provision of the First Amendment and on the equal protection and due process provisions of the Fourteenth Amendment (R. 146).

Petitioner's motion, that the committee not pursue the line of inquiry with respect to the right of revolution, was denied and he was asked to set forth his position on the subject. This he proceeded to do by furnishing extracts from the writings of President Abraham Lincoln, Senator Daniel Webster, and St. Thomas Aquinas, as well as from the Declaration of Independence and a statement petitioner had made on another occasion (R. 147-148).[18] Petitioner stated that these documents set

---

[18] Surprise has been expressed that petitioner, notwithstanding his objections to such examination, consented to answer fully questions on the subject of the right of revolution after his objections had been overruled. (See, *e.g.*, Committee Majority Report, Appendix, Pet. Writ. Cert., 18n.) In addition, there have been comments such as that of Mr. Justice Schaefer and Mr. Justice Davis in their dissenting opinion (Appendix, Pet. Writ. Cert., 80):

> . . . Petitioner's] views upon the right of revolution were fully expounded before the Committee. Those views are incompatible with membership in the Communist Party, or with any-

forth his present beliefs on the right of revolution, adding the qualification that, if anything, both Webster and Thomas are more radical than he is with respect to this issue (R. 149-150).

---

thing resembling subversion. It is hard to understand the logic of a position that permits the applicant to expound at length upon his views as to the right of revolution but prevents him from answering questions as to Communist Party membership. But we cannot say that what seems to us to be a logical inconsistency is a reflection upon his character.

Petitioner has explained that not only did he want to keep the issues as precise as possible and to cooperate with the committee as fully as possible in the course of the rehearing, but he recognized that his views on the right of revolution and the Declaration of Independence were already known to the committee and had been critical in the committee's 1950-1951 decision to ask and insist upon questions about his possible political affiliations. (See, *e.g.*, R. 489)

Furthermore, he has argued, there is an important practical difference between (1) discussion of the right of revolution and (2) inquiries into one's political affiliations (which petitioner has always refused to answer). The first relates to an applicant's understanding of the Constitution, to the support of which an oath is to be taken by the attorney (see Items 19(a) and 20, Questionnaire, R. 381-382; also, Note 13, this Brief); the second relates to one's political views, to one's views on the best government or party under the Constitution. Our constitutional system *can* usually operate properly if the first is open to discussion while the second set of views is left to the individual to disclose and act upon as he wishes. The second has to be protected in this manner, if only because of party spirit and of the harm that can befall the Constitution should this area not be kept beyond the inquiry (and hence control) of a particular partisan government. (This concern is reflected, for instance, in the protection given the secret ballot.)

It would be better, petitioner advised a member of the court below in 1955 (R. 418, 421), if bar admission committees were required to steer clear altogether of discussions about the right of revolution as well: the distortion of petitioner's views on this subject, both in the committee report and in the opinion of the court below, should provide warning enough against such inquiries and discussion. But, in any event, petitioner has sought to keep the issues separate; he has spoken freely about his views on the Constitution (and, therefore, on the right of revolution); he has consistently refused to answer questions about possible membership in any number of political organizations, "subversive" or otherwise (even though he cannot be held responsible for the inferences (logical or otherwise) anyone might draw from his expression of this or that view of the Constitution or, indeed, from his entire position before the Committee).

Much of the subsequent discussion this session centered about petitioner's views on this subject, which are best summed up by him in his statement (R. 148; 341-342):

> Almost everyone would agree there are times when a government should be overthrown by force. Ultimately, a citizen has to decide for himself when such a time comes—when the principles of the Declaration of Independence apply. The conscientious citizen reserves the right and duty to judge his government even as he takes the oath to support not that government but the Constitution. In fact, our Constitution can be said to have this right implicit in it, a right that protects the Constitution itself from subversion by a government that may be constitutional only in appearance. But, as I said when I first appeared before the full Committee on January 5, 1951, I do not think anyone would be justified at a time such as this, when the normal processes of government permit reasonable and peaceful change, to participate in action leading to the overthrow of government.
>
> The right of revolution, as I understand it, is something that probably all the members of the Committee on Character and Fitness and of the Supreme Court of Illinois believe in. The Committee must realize that I would be no less reluctant than they to see this right of revolution exercised except in the most extreme circumstances. I trust that my position, and what I have contributed to its defense, indicate an abiding commitment to constitutional government.

After considerable discussion, during which he elaborated his position on the right of revolution, petitioner refused to answer whether he felt the Marxist view about revolution was compatible with the views expressed in the documents he had submitted (R. 156), explaining

> . . . I do not want to be put in the position of endorsing—explicitly endorsing or denying communist

> doctrine. I am willing to be put in a position, having set forth my objections to all this kind of inquiry, of expressing clearly what my views are.

After having been further examined with respect to his opinions about various hypothetical statutes and cases relating to the right of revolution and its advocacy, petitioner stated (R. 158),

> . . . let me stress again, I may be wrong in many of the answers I give you as to whether I think particular statutes are unconstitutional or not. But that's not the issue. The issue is not about these supposititious cases but about my character and fitness, and you know about my character and fitness the claim on my part—and I have yet to see it demonstrated differently—the claim that I believe with respect to the right of revolution what practically every one of you believe.

Nevertheless, Commissioner Stephan thought it appropriate, as relevant to the right of revolution inquiry, to ask petitioner once again whether he was then a member of the Communist Party, against which petitioner protested (R. 160),

> . . . There is an objection [to be made here] on the basis of elementary notions of fairness. . . . There is no indication at all by anything I have said so far, about revolution today, that would make it necessary to go through this procedure [of inquiring into affiliations] again.

The session drew to a close with an inquiry as to whether petitioner would ever feel justified in resisting by force the implementation of a decree of the United States Supreme Court which he thought "simply wrong, or shameful, or, in your view, unconstitutional" (R. 161) Petitioner responded, "I would not care to say that there would be no instances in which force might have to be

brought to bear" (R. 161), adding however that in the instance in which he was put to the test (that is, his bar admission matter) he had not resisted such a decree by force. He went on to say about resistance to Court decrees (R. 163),

> Obviously, under present circumstances I don't think it is likely to happen. But, for instance, in Germany where judicial decrees, in accordance with the form of the constitution, were resisted. . . .

Furthermore, he pointed out, "there may be extreme circumstances when this resistance [to judicial decrees] would be a defence of the Constitution" (R. 164).

Petitioner stressed several times that, in speaking about the right of revolution and resistance to judicial decrees, he was speaking of extreme circumstances, insisting that he could not foresee any cause for revolution on the American scene in the years ahead. His being pressed for "immediate" examples of circumstances in which the right of revolution might rightfully be exercised led to this exchange (R. 167):

> Commissioner Young: Tell us something that you think might happen tomorrow that you think might justify it.
>
> Mr. Anastaplo: Suppose for some reason or other, the legislature and government went insane tomorrow from some kind of chemical reactions—only Washington went crazy. What do you and I do until next election? Do we sit by and let them destroy us?
>
> Commissioner Young: Can we make the example a bit more realistic?
>
> Mr. Anastaplo: It has to be unrealistic, because realistically, I say, I see nothing, I expect nothing. But if you insist upon talking about possible conjectures, I have to talk about very unrealistic examples, or else go elsewhere for them.

Commissioner Stephan: I think we are going to have to adjourn.

6. Fourth Session, April 23, 1958.

The session opened with this exchange (R. 169):

Commissioner Stephan: There is just one question I want to get clear in my own mind, and perhaps it troubles other people, too. On the question of possible communist affiliation, is it your position that a question directed to that matter is irrelevant, or that notwithstanding its relevancy, it is an improper question because of protection that you have under the First or Fourteenth Amendment?

Mr. Anastaplo: Well, I would say first of all, that it's an improper question under the Constitution, on the basis of the various reasons that I have given from time to time. I would say, furthermore, that even if it is proper in some cases, some foundation or relevance for the question would have to be shown. Third, I would say, that even if no foundation or relevance has to be shown, a refusal to answer the question for the reasons I have given—mistaken reasons or not—would be only one more piece of evidence in the record, and would be, I would suggest, extremely flimsy evidence in this record, where there is absolutely no [evidence of such affiliation].

Subsequently, petitioner presented an analysis of the problem of how the refusal to answer questions about Communist Party or other memberships had to be interpreted in the circumstances of his case. (R. 174-180) He established, at least to his satisfaction, that anyone refusing to answer affiliations inquiries in the circumstances of petitioner's record (where a denial of memberships could not be impeached) had to be either a non-Communist or an honest and scrupulous Communist, either of which would be eligible for admission to the bar even in the committee's view. He concluded this analysis with the comment (R. 180),

> The analysis I have just made has implications with respect to the due process of law. Your approach is inherently ineffective for the purposes a reasonable man may claim for it. But your approach is all too effective in discouraging your applicants to stand by principles, to speak truthfully to you, and to take seriously constitutional government, personal integrity and the rule of law.[19] These, indeed, are very grave results of what you have done, far graver for the Illinois Bar and the State of Illinois than all of the threats anticipated in the combined efforts of the Communist Party, the Ku Klux Klan and the Silver Shirts of America.

After this subject was exhausted for the moment, Commissioner Young returned to his inquiry of the session before concerning petitioner's belief in a Supreme Being as it related to the validity of petitioner's oath (R. 185). Petitioner's refusal to alter his position of the preceding session—his refusal to indicate whether he did hold such belief in a Supreme Being—finally led to this development (R. 188-189):

> Commissioner Young: Mr. Anastaplo, I read to you this statement from the case of *The Central Military Track Railroad Company* v. *Rockafellow*, R-o-c-k-a-f-e-l-l-o-w, which is in 17 Ill. 541, and reading from page 554:
>
> > "But one having no religion, believing in no God, and not accountable to any punishment for falsehood here, or hereafter, except his own notions of honor, veracity and amenability to criminal justice, cannot be sworn, as no legal, moral, conscientious obligation or responsibility, in the view of the law, can be imposed by an oath, and he may not testify without."
>
> Did you ever consider that?

---

[19] See the passage from Brown and Fassett, "Loyalty Tests for Admission to the Bar," 20 U. Chi. L. Rev. 480, 501, reproduced in Note 40 (this Brief).

Mr. Anastaplo: I should like to say a couple of things to that. First of all, what is the year of that case?

Q. Eighteen hundred fifty-six, and I don't find that it has been overruled or modified since then.

A. I would say that, in fact, this ruling is dead law. I think even the most elementary knowledge of Anglo-American law would furnish us with a very clear indication that that simply is not the rule of today. Secondly, I have not spoken to the issue of whether I have or have not religious affiliations. I have not denied the possibility that I have religious affiliations, or that I have eternal sanctions, or sanctions that apply to me in the afterworld. All that I have refused to do on that issue is speak to it.

As Commissioner Young pressed his inquiry, petitioner's protests to the chairman of the examination brought about this exchange (R. 190):

Commissioner Stephan: Nobody has drawn any inferences from what you have said. I don't know why you leap to the conclusion that you are necessarily prejudiced in what you said.

Mr. Anastaplo: From the very tenor and construction of Mr. Young's questions, I am led, simply as a matter of precaution, shall we say, to inquire of you whether this is an issue, whether this raises the problem I should speak to.

Commissioner Stephan: I explained to you that in the course of the proceedings, various questions of a miscellaneous nature have occurred to committee members, which the chair asked them to hold in abeyance until the formal questioning was over with. This is one of them.

Mr. Anastaplo: Mr. Chairman, I am put in a very awkward position. I have to determine—and this is one of the problems of the proceedings of this committee, and always has been—I have to determine, at the risk of my career, which question, by which member of the committee, is going to be taken seriously by the

committee a month from now, or six months from now.

Commissioner Stephan:[20] *I don't know how anybody can tell you that.*

After a recess during which the committee had gone into executive session, Commissioner Young was permitted to press his inquiry about petitioner's oath and religious sanctions (R. 191). Petitioner continued to object, concluding (R. 192),

> Let me also add that we are but one step now away from the old transubstantiation controversies of the last century and the centuries before, in England; that is to say, if you begin to ask questions about one's belief in God, and so forth, or imply that it may be a problem for consideration, it is one step further to inquire into the nature of this God or this belief that you are inquiring into.

Whereupon Commissioner Stephan was moved to respond (R. 192),

> One thing that I think is perfectly clear, and I hope it is to you, and that is that this committee is not exacting a religious qualification for the office of attorney in this state. That is emphatic, and I want it to be absolutely clear both in your mind and on the record.

But Commissioner Stephan and petitioner were in turn confronted by Commissioner Moses (R. 193-194),[20]

> Commissioner Moses: . . . I am giving you [the petitioner] *my own view* that a man who takes an oath without a belief in the Deity, is going through an empty form; he is not in good faith taking an oath; and *I also say* that one who would do that, in my judgment, would be unfit to be a member of the bar. And *I say further*, that if it is more important to him not to reveal his views on that subject, because in his opinion the First Amendment plus the Fourteenth keeps him from having to do so, that bears, *in my opinion, only, as a Commissioner*, upon his fitness, and I want

[20] Italics added throughout.

to give you that information at this time so that you can't feel that I withheld it from you.

Commissioner Stephan: You understand that *those views are the views of Commissioner Moses, and not necessarily the views of the committee.*

Mr. Anastaplo: But this is the problem, that I have to decide whether it is the view of the committee or not.

Commissioner Weiss: At this time, Mr. Chairman, can we go on with other questioning?

7. Fifth Session, May 19, 1958.

This session opened with Commissioner Young acknowledging that the religious sanctions case of 1856 relied upon by the commissioner in the session before had indeed been superseded by a later case. Petitioner moved immediately for a ruling that "the inquiries into my religious beliefs are improper and irrelevant," a motion upon which action was deferred (R. 206). Petitioner also announced that he had prepared some remarks on Commissioner Young's line of questioning about religion and on the commissioner's use, and the committee's acquiescence in the use, of a case that petitioner had learned had been nullified by the 1870 Constitution of Illinois. These remarks were postponed to the end of the session.

In response to inquiries from Commissioner Moses, petitioner indicated again that there might conceivably be circumstances in which he would feel justified in forcibly resisting the enforcement of court judgments or decrees in order to support the Constitution (R. 211). In such extreme circumstances, he said, he would be acting as a citizen, not as a lawyer (R. 212-213). An exchange with Commissioner Sawyier at this point illuminated petitioner's position (R. 215-216):

Commissioner Sawyier: Mr. Anastaplo, under the system of appeal, and so forth, on the questions Mr.

Moses asked you, it isn't very likely, there is only a remote possibility, as I understand it, that any one situation of resistance to a final order would ever be justified?

Mr. Anastaplo: That is true.

Q. I mean, I can understand the situation such as that in Nazi Germany, where a man is arrested and sentenced and although there are appellate courts, and so forth, they are not functioning; is that the kind of situation you have in mind?

A. Yes, but even in Nazi Germany I would be cautious. That is to say, I mean, I think in Nazi Germany, the Jews, just as well as the "good" Germans, as they were called, should have resisted. But I think a prudent guidance of that resistance was also necessary, not blindly or recklessly; I mean, there are times when you have rights which have to be foregone, simply because of social considerations. Even before a bar commission, such as this one, I would say that there are rights which I have defended, which, under other circumstances I might decide not to defend, simply because social consequences that follow might be more harmful to the bar and to the state in my defense. I think that is not the situation in this case.

Subsequently, in response to requests from petitioner, the chairman of the full committee (after the committee had recessed for an executive session), stated (R. 233-234),

Commissioner Thomas: . . . I will add for your information, and for the record, that the question as to whether an applicant is or has been a member of the Communist Party, or of various other organizations, including organizations listed as subversive on the Attorney General's list, has been and currently is, including this spring session, frequently asked of candidates. I can tell you that from my own information, having been a member of the committee for a good many years, participating both in panels, that is in the

initial meetings, with candidates, and also in the participation of the full committee. Now, on the—[21]

Mr. Anastaplo: Before you go on, could I ask a question about that?

Commissioner Thomas: I will add on that, that that question has frequently been asked where there is no indication on the face of the questionnaire, and the answers thereto, or the affidavits, or of the discussions up to that point, as to the man's having been or even suspected of being a member of various organizations of that nature.

Mr. Anastaplo: You mean you ask it, I take it, in most of these cases, out of the blue?

Commissioner Thomas: In many cases it is asked out of the blue. That doesn't exclude the possibility—

Mr. Anastaplo: —the possibility of it being asked for some reason, in other cases.

Commissioner Thomas: Yes, that's right . . .

---

[21] Neither Commissioner Thomas nor Commissioner Stephen (R. 79) was a member of the committee when petitioner first appeared before it in 1950-1951. Petitioner submitted (R. 79-80) a memorandum by Mr. Stephen Love to the court below in 1954. Mr. Love (who had once served as chairman of the committee) argued in the course of this memorandum:

> "If the question [about Communist Party membership] is desirable, then the Committee should ask it, or the Supreme Court should indicate the desirability of asking it, of every applicant for admission to the bar; it seems most unfair to submit this applicant to a three hour examination along these lines—particularly when the evidence does not show any Communist activity or sympathy on his part—while subjecting no other applicant to similar inquiries; several thousand applicants have been passed since the inception of the "cold war" without being asked a question along these lines.

Mr. Love also reported in this memorandum:

> [Petitioner] is probably the first applicant in the history of the Committee whose certificate was denied to him on the basis of his opinions rather than on the basis of any overt acts of misconduct.

(Mr. Love, who had been the lone dissenter when the committee first ruled against petitioner in 1951, was no longer a member of the committee which wrote the unanimous 1954 report explaining the 1951 ruling.)

The chairman, at the same time, made the following concession on behalf of the committee (R. 234):

> . . . I will tell you this. That no one has stated to this committee [orally or in writing] that you are or have ever been a communist, or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the organizations, or any one of the organizations listed as subversive by the Attorney General's list.

Petitioner returned to the problem of Commissioner Young's religious questions, asking that the committee rule such questions "out of order on the basis of this record" before petitioner began his analysis of "the *Rockafellow* situation" (R. 237). This request was refused as beyond the power of any commissioner to comply with. There was then this exchange between the chairman of the examination and petitioner (R. 237-238):[22]

> Commissioner Stephan: It has been pointed out before to you, that *the mere fact that a question is asked* does not indicate that other people would have asked or approved that question, *nor does it indicate that any particular weight will be attached to the answer or failure to answer the question;* do you understand?
>
> Mr. Anastaplo: I will have to speak to that problem. It is a very serious problem, procedurally, and under the rules of the court.
>
> Commissioner Stephan: In the nature of the case because of the nature of the subject matter and the type of hearing we conduct, a great deal of latitude is given both in the manner of questioning, the type of question asked, and in the type of response permitted. I don't think you could feel that you have suffered from the lack of latitude.
>
> Mr. Anastaplo: I'm sorry. I submit, then, that if this is inherent in the committee's procedures, then the procedures of the committee are inherently unfair and I will try to show what I mean.

[22] Italics added throughout.

The session ended with petitioner opening his detailed analysis of Commissioner Young's religious inquiries, and of the legal research exhibited in the session before, particularly as they cast light on the essential irresponsibility of the committee's procedures and on the difficult choices with which vulnerable applicants are often confronted. Petitioner observed (R. 242-243),

> Let me say first of all, I simply cannot see how the committee can operate fairly the way it is proceeding. I take it, as you have indicated already, that the committee permits any commissioner to ask any questions he pleases. No attempt has been made, in my experience, to police the questions. So far as I know, the committee implicitly adopts all questions, never disavows any, and certainly never, whether or not at the request of an applicant, rules any question out of order. Rather, the applicant is forced to decide for himself what is a serious question and what a foolish one, what comes from an informed and responsible, and what comes from an uninformed or irresponsible man. In short, the committee sinks to the lowest level to which any member chooses to take it.

At one point in his statement petitioner conceded (R. 249),

> My suspicion is that in a court of law you are all honorable men, and that you would not permit yourselves to do, or permit your opponents to do the things that you permit yourselves or your fellow members to do to helpless applicants. The procedures and standards you employ make it hard for you, as a committee, to behave the way you expect others to behave towards you in other judicial proceedings. You permit yourselves too much power and divest yourselves of too much responsibility. Almost inevitably you become unfair in both the common sense and the constitutional sense, when you encounter conscientious opposition. I submit to you again, a thoroughgoing reform of committee methods and standards is necessary, a reform

that curbs many of the radical things that you have been doing. . . .

Finally, petitioner predicted accurately (R. 249-250):

> Of course, you might all later decide not to say anything about these religious inquiries in your report to the Supreme Court. You might wash them out of your decision. There is precedent for such selectivity in the 1954 report of this committee to the [Supreme Court of Illinois], in which unanswered questions about membership in the Ku Klux Klan, and in fact about all organizations I might belong to, and about subscriptions to the Daily Worker and the Chicago Tribune were completely ignored by the committee in its report to the Court. This, of course, resulted only in a distortion of the issues and of the nature of our controversy, just as there would be a distortion now if one does not remember my refusal before you to answer questions about membership in the Ku Klux Klan, the Silver Shirts of America, the Republican Party, and the Democratic Party, as well as questions about God and the hereafter, all of which questions I have been asked and have refused to answer.[23]

8. Sixth Session, May 26, 1958.

This, the final session conducted during petitioner's current rehearing, opened with an announcement by the chairman of the examination (R. 256):

> The hearing will please come to order. Mr. Anastaplo, I have been instructed by the Committee to advise you that all matters pertaining to your religious beliefs, or your lack of any religious beliefs, and your failure to respond to questions directed to that subject

[23] The Republican and Democratic Parties inquiries emerged as a result of the attempts by Commissioners Bane and Young to secure an answer about petitioner's political affiliations by exploiting the fact that petitioner had served on several occasions as the official election judge in his Chicago precinct. (R. 22-26, 182-184.) (See, for an appraisal of this episode, Appendix, Pet. Writ. Cert., 63.)

> matter, will be entirely disregarded by the Committee in arriving at its determination as to your character and fitness. . . .

Petitioner thereupon filed with the committee the remainder of his statement on Commissioner Young's religious inquiries, introducing it with the explanation (R. 261-262):

> . . . I believe that I show in the remainder of my statement that the use of the *Rockafellow* case was clearly improper and unfair, and certainly irresponsible, even if it is assumed that the case is still good law. I also indicate, as I have to some extent already, how and why this impropriety, unfairness and irresponsibility, have not only been permitted, but even encouraged by Committee practices and procedures. This Committee has from time to time pointed to its practices and procedures to justify what it is doing or to challenge what I have been claiming. I think it not only necessary, but even legitimate, therefore, to show what is wrong with these practices and procedures, however much of an indictment of the Committee it might seem to you. I believe, therefore, that the *Rockafellow* case incident and your acquiescence in that incident and your questions based upon that case, clearly demonstrate to reasonable men what is wrong with the way the Committee conducts its business. Therefore, the analysis I offer you is vitally necessary, to consider my view of the case. May I, however, continue to stress my willingness to help improve the practices and standards that I am compelled to criticize.[24] I assure you that I would not have gone to all this trouble throughout the years, for my benefit alone.
>
> . . .

Petitioner concluded his discussion of this subject with the following requests to the committee (which have never been granted) (R. 276):

---

[24] See petitioner's two letters during the Summer of 1955 to a member of the court below. (R. 418-426)

Now I should like to have you rule in a more formal form than you have, than you did at the beginning of the session, that the inquiries into my religious beliefs were improper and irrelevant under the law of the land and for the purposes of these proceedings. I should further like to have you rule that my refusals to answer these inquiries constitute no adverse evidence with respect to my qualifications for admission to the bar. I understand that, in a sense, some aspects of these two rulings have already been made. I even venture to suggest and request that an even fairer ruling now, and report later to the Court on this point, would be to the effect that such refusals as mine under these circumstances, really constitute highly favorable evidence with respect to bar admission qualification. That is, I assume that the legal profession should encourage applicants for admission to the bar, as well as lawyers, to stand on principle and to resist vigorously official usurpations of authority.

Petitioner, in the course of bringing the hearings to a close, returned to his position on the right of revolution (R. 279-280):

. . . I sometimes rebuke myself for the amount of hair-splitting and refinement in which I have acquiesced in answering your carefully, if not deviously, worded questions about the exact moment in some unforeseeable future when I might conceivably be obliged to exercise the right of revolution. Really, all this is unbecoming. Can you gentlemen deny that you believe in the right of revolution as much as I do? Do you dare admit that you would sit idly by if tyranny comes, or, if you would sit by, do you say you would see something immoral or unfit in those of your fellow citizens who strive to re-establish constitutional government, or to protect it before it is torn down? Certainly you cannot believe what your cautious questions and timid formulations would suggest you believe. I put it to you, there is nothing I have said about the right of

revolution that all of you who have thought about the matter do not also believe in. Let us throw caution and timidity to the wind for the moment and indulge ourselves in the proud proclamations of a free spirit.

Permit me to read to you two excerpts from a lecture on law, in 1790, by Justice James Wilson of the United States Supreme Court, one of the authors of the Constitution. These excerpts are reproduced in my closing argument as well, but they bear repetition, considering how much we have questioned our heritage these last few months. Mr. Justice Wilson says at one point, to an audience that included President Washington—and here I quote: " . . . the principles of our Constitutions and governments and laws are materially better than the principles of the constitution and government and laws of England. Permit me to mention one great principle, the vital principle, I may well call it, which diffuses animation and vigor through all the others. The principle I mean is this, that the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their Constitution, at whatever time, and in whatever manner, they shall deem it expedient." And again a few minutes later Mr. Justice Wilson reminds us of dogma we should not have forgotten. Again I quote: " . . . a revolution principle certainly is, and certainly should be taught as a principle of the constitution of the United States, and of every State in the Union. This revolution principle —that, the sovereign power residing in the people, they may change their constitution and government whenever they please—is not a principle of discord, rancor or war: it is a principle of melioration, contentment, peace. It is a principle not recommended merely by flattering theory; it is a principle recommended by happy experience."

May I once again assert that I have never said anything about the right of revolution that did not spring from the sentiments embodied in the Declaration of Independence. I must continue to defend that Dec-

laration, even if it means my continued exclusion from the bar of this State. . .

Subsequently, in the course of this final session, there was this exchange between petitioner and the chairman of the examination (R. 294-295):

Mr. Anastaplo: Are you prepared to say at this time what questions, if any, that I refused to answer in the course of this rehearing, seem to raise problems for the Committee with respect to my character and fitness, and if so, why such particular questions, if any, do raise problems? This is not necessarily a ruling, but simply a matter of information to guide my further conduct in the course of this rehearing.

Commissioner Stephan: We have gotten into several areas where the persistence of the questioning and the character of the questions and the warning that you have been given from time to time about the materiality of the questions, should make clear the answer to the question you put to us now. I certainly would not at this time attempt to review a three or four hundred page record and tell you what question we thought was relevant and which one wasn't. I think you know the main areas of inquiry, and I think your suggestion is not a feasible one.

Mr. Anastaplo: I see. You mean, nothing stands out in your mind right now that you would care to point to as particularly important?

Commissioner Stephan: There are several things that stand out in my mind.

Mr. Anastaplo: You would not want to state what they are?

Commissioner Stephan:[25] I don't think I would, no. *I don't know what stands out in other people's minds. These are matters that the Committee will get into when it reviews your case.*

[25] Italics added.

The final session of petitioner's appearance before the committee concluded shortly thereafter with the delivery of petitioner's Closing Argument, which he outlined in this manner (R. 312-313):[26]

> The closing argument and brief that I should now like to submit to you may be conveniently divided into thirteen parts. After my introductory remarks, I propose to consider generally the record on character and fitness, and then my character references and affidavits. Thereupon, I will speak of the Declaration of Independence, first as it relates to the history of this case, then as it affects the decision in 1954 of the Illinois Supreme Court. This will be followed by a discussion of the lack of foundation in this record for the affiliations inquiries. I propose then to make a survey of the constitutional arguments I present, before proceeding to discuss, first, the significance of the Konigsberg case record, and then the relevance of the Konigsberg decision. I should thereupon like to say a few words about the current challenge to republican government, before going on to some remarks about the American scene and about the role of the American bar in our time. After making some appropriate closing remarks, I will have done my duty and you will be left with yours.

9. After the Sixth Session, May, 1958 to January, 1960.

Four months after the conclusion of petitioner's examination before the committee, petitioner was informed by the committee (on September 16, 1958) that if he wished to comment on the then recent cases of *Beilan* v. *Board of Education*, 357 U.S. 399, and *Lerner* v. *Casey*, 357 U.S. 468

---

[26] The Closing Argument, which is found at R. 314, has been reprinted in its entirety in Volume 19, Number 4, of The Lawyers Guild Review. The majority and minority opinions of the character committee have been reprinted in Volume 19, Number 2, of the same publication.

("which may have some bearing on your pending application for admission to the bar of this state"), he might do so (R. 441):

> . . . The Committee wishes to be advised whether, in the light of such decisions, you wish to change, modify or supplement any answers which you have given to the Committee's questions or alter your testimony in any other regard.

Petitioner's answer, of September 23, 1958, consisted of a detailed analysis of the significance and relevance of these cases with respect to his application. One of the points he made is set forth in this passage (R. 443-444):

> It should be appreciated that the *Beilan* and *Lerner* cases really add very little to the law as it has been laid down by the Supreme Court of the United States since long before the *Konigsberg* and *Schware* cases. The Court, in the *Beilan* and *Lerner* opinions, relies for the most part on the cases of *Adler* v. *Board of Education*, 242 U.S. 485, and *Garner* v. *Board of Public Works*, 341 U.S. 716. These latter cases, involving *public employees*, were before the Court when it passed on the *Konigsberg* and *Schware* bar admission matters. I do not believe the Court even mentions the *Adler* and *Garner* cases in the *Konigsberg* and *Schware* opinions, a silence which suggests that we are dealing with two different lines of cases here, one relating to public employment, the other to bar admissions.
>
> . . . in the *Beilan* and *Lerner* cases, the Supreme Court seems once again to have emphasized the doctrine of the *Adler* and *Garner* cases that for a public employee to refuse to answer a question deemed relevant may justify dismissal.
>
> The *Garland, Cummings, Schware* and *Konigsberg* decisions, on the other hand, indicate that different standards are called for when the area of public employment is left and that of bar admission is entered. Similarly, the Committee has acknowledged that a refusal to answer inquiries deemed relevant at one time

> or another in the course of a bar admission proceeding is not, in itself, sufficient to exclude an applicant from the bar: the Committee conceded, for instance, after I had persisted in refusals through several sessions and for several weeks, that I could without penalty refuse to answer the questions about religion that had been so strongly pressed upon me. . . .

Another point had to be emphasized in petitioner's letter (R. 446):

> . . . In the *Lerner* and *Beilan* cases, there is a more or less formal reliance by the penalty-exacting State upon refusals to answer two questions; there seems to be little else in the way of inquiry in the records.
>
> The Committee, on the other hand, has a four-hundred page transcript in which the justifications, purposes and relevance of the unanswered questions are, to say the least, shown to be questionable. It is a record with no adverse evidence and with more than enough positive evidence not only to sustain but even to require a finding favorable to my application.
>
> In order to rely on the *Beilan* and *Lerner* cases to deny my application, the Committee would have to claim that the hearings should have been concluded after the first unanswered questions (which happened to be about religious affiliations [R. 16], or soon thereafter when the first political questions were left unanswered [R. 28]) . . .

Much is made in the committee's majority report of petitioner's refusal to abandon his position after the committee's letter about these cases (Appendix, Pet. Writ. Cert., 20, 27). The committee neglects to mention that petitioner's refusal was one that was carefully argued, not the arbitrary disregard of the committee's inquiry which is suggested by the two-word sentence, "He declined." (Appendix, Pet. Writ. Cert., 20) This exchange of letters, and the committee reaction to it, prompted Professors Harry

Kalven, Jr. and Roscoe T. Steffen to comment in their *amici* brief filed in the court below (R. 508),

> In view of the Committee's own handling of the *Beilan* and *Lerner* precedents, it adds a note of irony to the record that the majority made so much of Anastaplo's intransigence in failing to capitulate to their reading of the two cases.

It was not until a year after petitioner's final appearance before the committee that a decision was announced by the committee (April 9, 1959),[26a] with eleven members voting against recommending petitioner for admission to the bar and six voting in his favor.[27] The decision of the committee

---

[26a] "I also fail to perceive the necessity for the delay of an entire year between the conclusion of the hearing and the decision of the committee." Mr. Justice Bristow, dissenting (Appendix, Pet. Writ. Cert., 64).

[27] A week after receiving the committee's report, petitioner wrote (on April 16, 1959) to the committee chairman asking that the committee officially acknowledge the following information (R. 474):

> Since receiving this Report, I have been informed that at least three members of the Committee majority have made inquiries of or discussed my matter with members of the Chicago bar who have known me for some time. These inquiries related to my background, character and activities, as well as to other topics. I have reason to believe that Committee members were given nothing but favorable information about me on these and other occasions.

The chairman replied (R. 475):

> The Committee has considered your request and deems it inappropriate that such inquiries be made of the individual members. The decision of the Committee was made solely on the record before it, which has been closed and sent to the Supreme Court.

Additional information on this point is reported in petitioner's 1959 brief in the court below (at pages 16-17):

> . . . The Committee does not—it cannot—deny the information [about inquiries made by members of the committee] that I happened to be given. In fact, since writing to the Chairman I have received additional information about more contacts of the kind I describe in my letter of April 16. It even seems that individuals who had submitted character affidavits on my behalf

was affirmed in the court below by a vote of 4-3 (November 18, 1959; January 21, 1960).

The court below opened its *per curiam* opinion with a review of its 1954 opinion denying petitioner admission to the bar.[28] Thereupon, after indicating the evidence before

---

were questioned about me by individual members of the Committee who were either acting officially or improperly (Committee Rule 15 [R. 370]).

The real complaint of the Committee is not that it cannot learn enough about me, but rather that it cannot learn anything adverse to my application. It seems to think that unless something derogatory is turned up, it is not relevant evidence. As a result, favorable evidence is suppressed or ignored. . . . The rules of fair play and due process require that the members of the Committee be obliged to acknowledge the favorable evidence that they have turned up in their individual inquiries: they sit as commissioners of the Court in a judicial capacity, not as counsel permitted to introduce only evidence favorable to their clients.

(See, also, R. 49-50 and the discussion, in petitioner's letter of March 27, 1958 (R. 115-116), respecting an earlier investigator's report suppressed by the committee.)

Related to this problem is the comment on the committee report by Professors Kalven and Steffen in their *amici* brief (R. 501),

. . . The majority seems to intimate that somewhere, someplace, there surely must be some evidence of disloyalty or of bad reputation, but the fact is that in seven or eight years of investigation and inquiry, nothing of the sort has come to light.

[28] Since the author of the *per curiam* opinion drew as much as he did on the language of his earlier opinion in this 1959 review of the earlier (1954) opinion, he repeated the serious error as to the order of inquiries directed to petitioner in his first (1950) appearance before the committee. (Compare 3 Ill. 2d, at 473-474; Appendix, Pet. Writ. Cert., 35.) This error was repeated despite petitioner's emphasis on this error both in his Closing Argument (R. 320-331) and in his brief before that court (p. 18). The fact remains, the significance of which the court below has yet to consider, that the sequence of inquiries was exactly the reverse of that described in its 1954 and 1959 opinions: questions about affiliations came only after petitioner's answers about the right of revolution and only because committee members were hostile to the legitimate opinions on the subject of rightful rebellion that petitioner had expressed on request. See, Sharp, "Freedom and a Free Bar," 17 Lawyers Guild Rev. 43; Note, 50 Northwestern Univ. L. Rev. 94.

the committee, the court below reported (Appendix, Pet. Writ. Cert., 39),

> During the interval between denial of his original application [in 1951] and the submission of his second application, Anastaplo had been employed the greater part of the time as an instructor and research assistant at the University of Chicago. The character affidavits and letters of reference supplied by Anastaplo discloses that he is well regarded by his academic associates, by professors who taught him in school and by lawyers who are personally acquainted with him. The committee says that it had not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation, and that it has received no information from any outside source which would cast any doubt on Anastaplo's loyalty or which would tend to connect him in any manner with any subversive group . . .

The court below went on to say about petitioner's views on the right of revolution (Appendix, Pet. Writ. Cert., 39-40),

> The committee conducted an extensive inquiry into Anastaplo's belief in the right to overthrow the government by force and violence. His testimony in this regard does not require narration since a majority of the committee concluded that while the views expressed by Anastaplo, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not and of themselves reveal any adherence to subversive doctrines. . . .

Reservations were immediately expressed thereupon, however, about a concrete instance of the exercise of this right of revolution—about, that is, petitioner's refusal to say

that he would, in all circumstances, obey all judicial decrees: his attitude on this problem seemed to

> raise a serious question whether the attitude expressed by Anastaplo toward final court determinations binding upon himself and toward attempts to enforce them conformably to the law is consistent with the oath required of attorneys in this State. An attorney is an officer of the courts. (*In re Day*, 181 Ill. 73.) In *Cooper* v. *Aaron*, 358 U.S. 1, 3 L. ed. 2d 5, the United States Supreme Court said, at page 8: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." [Appendix, Pet. Writ. Cert., 41]

The court below then turned to what it called, "The major issue presented to the committee [which] arose from the applicant's continued refusal to answer questions regarding possible Communist or other subversive affiliations" (Appendix, Pet. Writ. Cert., 41), and reaffirmed its 1954 assessment of Communist Party membership (Appendix, Pet. Writ. Cert., 42),

> It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. . . .

The opinions of this Court in *Orloff* v. *Willoughby*, 354 U.S. 83, *Lerner* v. *Casey*, 357 U.S. 468, and *Beilan* v. *Board of Education*, 357 U.S. 399 (all cases dealing with qualifications for some form of government service) were mustered in support of the position of the court below that (Appendix, Pet. Writ. Cert., 42-43),

> . . . questions as to membership in the Communist party or known subversive "front" organizations

were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate.

Further support was sought in the opinions of this Court in *Barenblatt* v. *United States*, 360 U.S. 109, and *Uphaus* v. *Wyman*, 360 U.S. 72 (both cases dealing with the extent of power of government to make a "subversive inquiry") (Appendix, Pet. Writ. Cert., 50).

The court below concluded its opinion with the observation (Appendix, Pet. Writ. Cert., 52-53),

> The Committee on Character and Fitness drew no inference of disloyalty or subversion from Anastaplo's consistent refusals to answer questions concerning Communist or other subversive affiliations. We agree with the committee that a strong public interest supports the interrogation of applicants for admission to the bar on their adherence to our basic institutions and form of government and that this public interest in the character of its attorneys overrides an applicant's purely personal interest in keeping such views to himself. In the light of *Barenblatt* v. *United States*, 3 L. ed. 2d 1115, 79 S. Ct. 1081, alone, the relevancy of an inquiry as to whether an applicant for admission to the bar is a member of the Communist Party is no longer debatable. Decisions of the United States Supreme Court since *In re Anastaplo*, 3 Ill. 2d 471, fortify our earlier conclusion that a determination as to whether an applicant can in good conscience take the attorney's oath to support and defend the constitutions of the United States and the State of Illinois is impossible where he refuses to state whether he is a member of a group dedicated to the overthrow of the government of the United States by force and violence. By failing to respond to the higher public interest, Anastaplo obstructed the proper functions of

the Committee on Character and Fitness. By virtue of his own recalcitrance he failed to demonstrate the good moral character and general fitness to practice law necessary for admission to the bar of this State.

Vigorous dissents were filed by three members of the court below, who placed heavy emphasis on the record in this case. Thus, Mr. Justice Schaefer and Mr. Justice Davis open their dissenting opinions with the acknowledgment (Appendix, Pet. Writ. Cert., 78),

> As a result of the exhaustive hearings before the Committee, we now have far more information as to the moral quality, the legal capacity and the political views of this applicant than is ordinarily the case.

And Mr. Justice Bristow concludes his detailed analysis of the *per curiam* opinion with the following appraisal (Appendix, Pet. Writ. Cert., 77-78):

> Anyone reading this record, whether or not he agrees with George Anastaplo's interpretation of his constitutional rights, cannot come away without being impressed by his adherence to truth and what he regards as basic principles of good citizenship. His refusal to answer certain questions is not in fear of the truth, but rather in defense of what he believes to be the truth—that a citizen, particularly a lawyer, has a duty to defend constitutional principles, "even at the risk of incurring official displeasure." His restrained and well mannered testimony and conduct at the hearing corroborate fully the glowing evaluations of his character and reputation in the affidavits submitted to the committee.
>
> On the basis of this entire record, it is my opinion that there was substantial evidence of George Anastaplo's good moral character, which was in no way marred by a single item of evidence from which the committee could reasonably conclude that there were doubts about applicant's honesty, fairness and respect for the rights of others or for the laws of the nation.

Under these circumstances, the committee's action denying applicant admission to the Illinois bar on the basis of its finding that he failed to establish good moral character, constituted a denial of due process of law under the decisions of the United States Supreme Court, and should properly have been rejected by this court.

After an unsuccessful attempt on the part of petitioner to "settle out of court" without sacrifice of principle (Appendix, Pet. Writ. Cert., 81-82), the controversy was brought by him to this Court on writ of certiorari.

SUMMARY OF THE ARGUMENT.

This case may be understood as an extended debate between petitioner and representatives of the Illinois bar about the kind of men America needs. It certainly cannot be understood if it is regarded as concerned with the character of the Communist Party or the Ku Klux Klan or with the qualifications of the members of such organizations to practice law.

The involved debate recorded in the transcript may be reduced, for judicial purposes, to a series of practical questions: What is the legitimate function of a Committee on Character and Fitness? Did *this* character committee perform its appointed task? If not, is it because the committee was denied evidence which it had both a right and an obligation to have before it could assess petitioner's qualifications for admission to the bar? Finally, and most important, is the petitioner of this record in fact qualified for admission to the bar?

The long record, behind which lies a decade of association between petitioner and the character committee, is so favorable on character and fitness grounds, in the usually accepted sense of these terms, that the refusal of the com-

mittee to be bound by it is so unreasonable and arbitrary as to constitute a denial of petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment. The committee suggests two justifications for its refusal to be bound by the evidence: (1) petitioner's views on the right of revolution (as expressed in his recognition of the validity of resistance even to court decrees under certain extreme circumstances); (2) petitioner's refusal on principle to answer certain questions about so-called "subversive" political affiliations (affiliations with organizations such as the Communist Party and the Ku Klux Klan).

Petitioner's views on the right of revolution, which includes the right to resist tyrannical acts, whether they take the form of court decrees or legislative enactments, are perfectly proper, and indeed are sanctioned for Americans by the Declaration of Independence. Petitioner's refusals to answer certain questions are based on constitutional and other principles and relate to organizations which the committee admits it does in no way associate with petitioner. Thus, neither of the excuses offered by the character committee should be permitted to justify the committee's refusal to be bound by the evidence as to petitioner's qualifications for admission to the bar. Indeed, the stand petitioner has made in the face of official disapproval and at the cost of his career at the bar—a stand in defense of the Declaration of Independence and in opposition to what he considers improper, bullying and unwarranted inquiry—really reinforces the other evidence in a record already favorable to his application for admission.

Further objections lie under the due process and equal protection clauses to the questions about political organizations asked by the committee and to the kind of hearing conducted by the committee. The political questions, which

are not of the kind usually regarded as appropriate and relevant for "character and fitness" adjudications, require some foundation in the record, especially since they seem on their face to invade constitutionally protected domains. Whether or not a foundation is deemed to be required, however, it seems that some showing should be made that the specified unanswered questions are vital or necessary before a claim can be made that they obstruct indispensable inquiry, especially when, as here, there are several other unanswered questions[29] that the Illinois authorities neglect to mention. Even if there should have been demonstrated the propriety of and need for the specified unanswered questions, it is argued by petitioner that a refusal to answer them should be considered only one more item of evidence in the record, not the obstructive element the committee would now make it out to be. Besides, the context of such "obstruction" cannot be ignored: it occurred in the first hour of a hearing which continued through several more months and for twenty more hours and it occurred with respect to organizations which the committee was obliged to admit it does not suspect petitioner of affiliation with. It is no wonder, then, that the committee minority concludes its dissent (Appendix, Pet. Writ. Cert., 33),

> We now know the applicant is fit and of good character. On this record, it is pure sophistry to hold that his refusals to answer have prevented our determining his character and fitness. To deny admission under these circumstances would be a disservice to the Bar and a violation of the traditional concepts of fairness

[29] About religion (see Note 61, this Brief); about doctrines identified by committee members as "Marxist" and "Leninist" (see, *e.g.*, R. 81, 155-156); ad about Republican and Democratic Party affiliations (see Note 23, this Brief).

and due process. To do so under the shelter of burden of proof is a retreat to formalism we are unable to join.

The *Konigsberg* and *Schware* cases, furthermore, seem to be applicable to petitioner's case. And yet, the Illinois authorities have attempted to distinguish the former and have virtually ignored the latter. If these cases are still authoritative, petitioner should be able to enjoy the benefit of their rationale; certainly, there is no substantial reason for distinguishing them to petitioner's disadvantage.

Even more basic than the foregoing arguments in petitioner's array of constitutional objections to the action of Illinois are those that rely on the First Amendment. It is only realistic to recognize that petitioner has been abridged of his freedom of speech from the beginning of his conflict with the Illinois bar in that he has been penalized for his views on the Declaration of Independence and the right of revolution. (Indeed, he was first asked questions about possible affiliations only after and only because of his defense of the principles of the Declaration of Independence.) In addition, petitioner argues that the right to refuse without penalty to answer questions about political organizations is protected by the First Amendment. It is most fitting that there should be such protection when the questions are foreign to the purpose of the state agency making the inquiries and when that agency concedes it has no evidence connecting the citizen affected with any allegedly subversive organization. In fact, the concession of the committee emphasizes the role that petitioner's views on the right of revolution have played in the committee's action against him.

Petitioner's position in resisting questions about political affiliations should be familiar as an expression of the historic and respected opposition to test oaths. Such oppo-

sition has been as likely among the "innocent" as among the "guilty". He asks that this opposition be regarded as a citizen's mode of speech appropriate to the occasion, as his protest against unconstitutional, ungentlemanly and harmful practices.

Whatever the validity of petitioner's views on the Constitution and on the needs of the bar and country, there is no reason why any erroneous opinions he may have expressed on these subjects should be taken as diluting in any way the affirmative case on his behalf as an applicant for admission to the bar. If anything, petitioner is to be commended, not censured, for having tried to induce men to act better than is their wont.

Finally, it is argued, this Court, as the supreme judicial body of the land, should review the standards and practices of state bar admission agencies not only for their constitutionality but for their wisdom as well. At least, it is suggested, the remedy of direct admission to the bar of this Court should be available in unusual cases: action of this kind would seem particularly appropriate in a situation such as this where an individual who has been denied admission to a state bar under unprecedented circumstances has clearly demonstrated his overall qualifications for the practice of law.

THE ARGUMENT.[30]

Introduction.

It is well to emphasize at the outset what should be apparent from the Statement of the Case, that the question of membership in the Communist Party or in the Ku Klux Klan is not an issue in this case, but at most only the effect in a bar admission case of a conscientious refusal to answer inquiries about such membership when it is conceded that there is no allegation or evidence of membership, when the inquiries occur only in the context of badgering about philosophical and political views, particularly views about the right of revolution, and when silence is couched in the form of a refusal to submit to something deemed by petitioner to be in the nature of a test oath and to be improper, ungentlemanly and unconstitutional inquiry.

The Illinois bar authorities knew as early as June 25, 1957 that petitioner would, in the event of a rehearing, maintain the position he had held since November 10, 1950: that is, he would continue to defend the Declaration of Independence and he would continue to refuse to answer questions about political affiliations.[31] Nevertheless, on

---

[30] The main lines of petitioner's position are set forth in the text of the Argument. It is possible to follow this text without reference to the footnotes. The sometimes repetitious footnotes are, for the most part, useful elaborations of points made in the text. Petitioner has elected to proceed in this manner rather than leave in doubt the main thrust of his attack.

If, in his use of long footnotes, petitioner exhibits the failing of an academician, he must plead in justification the regret that he has never been permitted to become a lawyer. If, in his attack upon the committee and in defense of himself, he is self-righteous and even tiresome, he must apologize for having become too much of a lawyer.

[31] Petitioner's Supplementary Petition for Rehearing, June 25, 1957. (R. 484-490)

September 17, 1957, a reexamination of petitioner's qualifications was ordered by the court below (Appendix, Pet. Writ. Cert., 7); and, from February to May 1958 there was conducted what may have been the longest bar admission examination in Illinois history.

Now, the State of Illinois presumes to claim that petitioner's "refusal to answer [the questions he had announced he would not answer] has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate" (Appendix, Pet. Writ. Cert., 43). This claim is hardly plausible and certainly not fair. The Illinois bar authorities should have denied a rehearing and taken their present position on June 26, 1957—that is, immediately upon learning that petitioner would not alter his position. They could then have claimed with somewhat more plausibility that petitioner's announced position seemed to them to obstruct further proceedings.

The Constitution and the rule of law demand that the Illinois bar authorities be bound by what they have learned about petitioner: twenty-two hundred dollars worth of record printing suggests anything but an obstructed inquiry.[32]

I. Due Process and Equal Protection.

A. The significance of the record.

Much is made by petitioner of the record simply because the central issue is that of his character and fitness for

[32] Some applicants are deemed by the committee to have been sufficiently "tested" for general fitness and good citizenship for bar admission purposes in appearances that last only five minutes before a subcommittee of two members (R. 227). See, also, Note 33 (this Brief).

the practice of law. This is an issue about which the record seems remarkably unambiguous.

The entire record, except for the effect of petitioner's refusal on principle to answer certain kinds of question, would generally be conceded as portraying petitioner as a man who has the "character and fitness" required of a lawyer. This record provides not only highly favorable affidavits from distinguished Americans (R. 388-414) and a lengthy examination of petitioner's career and thought, but it also affords the reader an opportunity to assess petitioner as he is revealed in almost two dozen hours of intensive and sometimes hostile examination before a large tribunal of experienced and well-prepared lawyers (R. 2-366). Certainly, there is nothing in the record to support any reasonable doubt about petitioner's good character or about his support of the Constitution.[33]

It should be remembered that the record is devoted to an applicant who had been before the same committee for almost a decade: the case had been publicized throughout the state in which petitioner lives; committee members were familiar not only with petitioner but also with his teachers, classmates, academic colleagues and friends. In addition, numerous informal inquiries about petitioner were made before and during the year that intervened before the committee announced its decision (Notes 27, 54, this Brief). In short, the committee knew quite a bit not only about petitioner but also about many who know him well—and yet there is no evidence in the record unfavorable to his qualifications as a lawyer.

---

[33] See Note 32 (this Brief). The seriousness with which the "burden of proof" is usually regarded in Illinois bar admission matters is also reflected in the fact that, during the ten-year period, 1938-1948, only eight out of a total of 3,805 applicants were rejected on the recommendation of the Committee on Character and Fitness for the First Appellate Court District of Illinois (which sits in Chicago). Shaforth, "Character Investigations," 18 Bar Examiners 194, 198 (1949). See, also, Note 35 (this Brief).

It is not surprising, then, that the members of the committee do not have any serious doubts about the character and fitness of petitioner. They may challenge his judgment and deplore his "recalcitrance" but they cannot bring themselves to express any reservations about his character and fitness in the ordinary or traditional sense. The most they can do—and this they do—is refuse to acknowledge the dictates of common sense which would concede petitioner's evident eligibility. *Haec non turpe est dubitare philosophos, quae ne rustici quidem dubitent?*[34]

It is unnecessary and unseemly to say much more than this about the qualifications of petitioner to practice law: fortunately, the record, which is readable, speaks for itself.[35] Even the evidence which may appear to some as unfavorable to petitioner—his long-standing refusal to answer any questions about possible affiliations in political,

---

[34] Cicero, *De Officiis*, Book III, Cap. xix.

[35] The following passage seems to state the generally accepted conception of "burden of proof" (*Coleman* v. *Watts*, 81 So. 2d 650, at 655 (Florida Supreme Court, 1955)):

> Although the burden of proof is always upon the applicant to "satisfy the Board of his or her moral standing," we have the view that when he has made the *prima facie* showing required by the statutes and rules governing admission to practice [law], "it is incumbent upon those making objections to offer evidence to support the same and to overcome the *prima facie* showing made by the applicant. It is not for the applicant to prove the falsity of the charges made against him." While the burden of proof never shifts, the burden of proceeding does.

Petitioner has maintained that

> . . . a *prima facie* case with respect to my character, fitness and ability and willingness to take the required constitutional oath as attorney has been established by my recent application and associated character references and affidavits. May I once again urge the Committee, in the interest of constitutional government and fair play, to restrict themselves to their proper function and to proper means in testing that *prima facie* case. I myself plan to cooperate as much as I can with any legitimate attempt by the Committee to inquire into my character and fitness . . . [Letter to the Committee, March 3, 1958, R. 67-68].

quasi-political and religious organizations—must be evaluated in its context: in fact, this refusal may well be evidence highly favorable in any just estimate of the qualifications of one who aspires to enter a profession which is pledged to take seriously the demands of justice, of honor and of the Constitution.[36] In this connection, petitioner's Closing Argument of May 26, 1958 before the Committee on Character and Fitness must be mentioned: that comprehensive statement presents and illuminates the context in which petitioner has been privileged to render a public service (R. 314-365).

The Committee's refusal to be bound by the record has constitutional implications: the evidence in this long record is so overwhelmingly, and in fact so exclusively, in petitioner's favor and the committee's decision is so unreasonable and arbitrary a disregard of that evidence and of the duty given it by statute that a serious violation of the due process clause of the Fourteenth Amendment has resulted. Or, to use the language of the concurring opinion in the *Schware* case, 253 U.S. at 249,

> Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause.

---

[36] Professors Kalven and Steffen, in their *amici* brief, observed (R. 498-499),

> We realize that the issue raised by the Applicant's stubbornness has its perplexities. We understand, of course, that admission to the Bar is a privilege to be granted by the State, on a satisfactory showing of good moral character. But we are convinced that Applicant has long since met any burden of proof in that regard. Indeed, his very adherence in this matter to what he regards as basic principles of good citizenship is a sure testimonial that he possesses in more than average degree the qualities of independence, intellectual honesty and moral courage that are the glory of the true lawyer.

(All references to an *amici* brief are to the 1959 brief filed by Professors Kalven and Steffen in the court below (R. 498-510), not to the 1960 brief prepared by them for the American Civil Liberties Union, Illinois Division, while this Brief on the merits was in page proofs pending receipt of the printed record.)

This sentiment, it is submitted, is but a recent manifestation of the interest that this Court has always had in correcting a "manifest wrong in the result" of a particular case. *Clyde* v. *Gilchrist*, 262 U.S. 94, 97.

The character committee's task, it is well to remember, is not to pass on the political opinions or affiliations of applicants for admission to the bar; its task is not even that of keeping out of the profession members of the Communist Party or of the Ku Klux Klan. Rather, the committee's task is limited to determining whether an applicant is likely to display as a lawyer

> . . . those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."[37]

In the final analysis, it should be irrelevant what questions of a political tendency remain unanswered or for what reasons[38] some questions are not answered if a committee has in the record at the conclusion of its investigation both considerable favorable evidence with respect to an applicant's qualifications and nothing else, not even suspicions or rumors, of an unfavorable tendency.[39]

---

[37] *Schware* v. *Board of Bar Examiners* (concurring opinion), 253 U.S. 232, at 247.

[38] So long as the reasons are not frivolous or otherwise contemptuous.

[39] The committee majority reports (Appendix, Pet. Writ. Cert., 24-25),

> Because the applicant has refused to answer questions, we are unable to report whether his activities since the denial of his original application have included membership, office holding or other activities in the various organizations listed on the Attorney General list of subversive organizations. We are also

In this matter, petitioner is fortunate to have had the irrelevance of the unanswered questions emphasized by the concession the committee was obliged to make (R. 234):

> . . . no one has stated [orally or in writing] to this Committee that you are or have ever been a Communist or a member of the Communist Party, or a

---

unable to report what his reputation is among the members of any organization with which he may be affiliated, since he has declined to inform us of his affiliations.

But what difference would it really make if the committee could not report on *this* issue? For, as Mr. Justice Bristow points out, this has never been the committee's assignment (Appendix, Pet. Writ. Cert., 64, 67, 74).

Several thousand applicants have been admitted to the bar in Illinois since petitioner was denied admission. (See Notes 21, 32, 33, this Brief.) On how many of them has the committee been able to report "whether [their] activities have included membership, office holding or other activities in the various organizations listed on the Attorney General's list of subversive organizations"? Why then must this be made an issue here? What showing or foundation is there, aside from the facts that petitioner had defended the Declaration of Independence and that he had resisted what he regarded as improper inquiry, to justify the insistence upon this issue in a character and fitness inquiry? No, petitioner did not obstruct the inquiry; rather, the committee perverted it.

Even so, the committee majority had in effect already reported even on this misconceived issue. For, earlier in the same report, it had conceded (Appendix, Pet. Writ. Cert., 11-12),

> . . . We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group.

What more could the committee have said if petitioner had explicitly denied membership in "any subversive group"? Since the committee had never received any information adverse to petitioner, it would have had to accept petitioner's denial unless it had doubts (on other grounds) about petitioner's character or reliability. The issue then resolves itself into the question of petitioner's character and fitness, where petitioner is content to leave it and to which the committee should return.

(See, in this connection, petitioner's analysis of the problem of how the refusal to answer questions about Communist Party or other memberships had to be interpreted in the circumstances of his case. R. 174-180).

> member of the Ku Klux Klan, or a member of the organizations or any of the organizations listed as subversive by the Attorney General's list. . . .

In short, the committee is acknowledging that it has no reason for insisting upon, or even asking, questions relating to these organizations of petitioner[40]—no reason that it is willing to acknowledge publicly. This qualification must be added because there *are* two reasons why the committee has pursued and insisted upon this line of inquiry: first, certain excitable committee members found and continue to find something suspicious and perhaps even subversive in petitioner's views on the right of revolution and the Declaration of Independence;[41] second,

---

[40] Questions about organizational affiliations seem to be asked at this time on a hit-or-miss basis by members of the committee (R. 79-80, 233). Nothing is said about them on the standard questionnaire form or in the committee rules (R. 371, 366). In 1950, when petitioner first went before the committee, such questions were asked only of applicants who gave the "wrong" answers to one of the opening questions such as, "Do you think a member of the Communist Party is eligible to practice law?" (R. 320-331). (See Notes 15, 21, this Brief). The atmosphere of that Korean War period, which has affected the attitude of the committee with respect to petitioner ever since, is indicated in a survey conducted at that time which is reported in Brown and Fassett, "Loyalty Tests for Admission to the Bar", 20 Univ. Chi. L. Rev. 480 (1953). One passage (at 501) suggests the bad influence upon character that the character committee has permitted itself to exert:

> . . . The affair [of petitioner] made a considerable impression on his contemporaries at Chicago, one of whom wrote as follows: "Although I have never been a Communist nor a member of organizations on the Attorney-General's list, my attitudes are such that had I acted with complete sincerity, I would not have replied 'no sir' to the question I was asked [about membership in subversive organizations]. But, I decided in advance, as did most of my friends, to give the answers best fitted to admission to the Bar without difficulty."

[41] Something of this attitude on the part of committee members was seen during the current rehearing in the development of the religious questions which, but for the carelessness of the commissioner

the Illinois bar cannot bring itself to admit that a law student who has been "recalcitrant" and hence penalized for a decade might have been right (or at least qualified to practice law) all along.[42]

These are not reasons that can be admitted by the committee with propriety and with any chance of success with reasonable men. But, on the other hand, it cannot be seriously argued on this record that the committee is unable to form a judgment on petitioner's qualifications until he answers all questions asked of him; nor can it be maintained that petitioner is simply obstructing this proceeding. Certainly, it has never been suggested that Illinois has any kind of rule which requires applicants, on pain of exclusion from the bar, to answer all questions put during the character inquiry;[43] there were many questions asked of petitioner—the most blatant of which had to do with religion—which he steadfastly refused to an-

---

who relied upon the *Rockafellow* case, 17 Ill. 541, might have been even more serious than they were (R. 187-190, 192-194, 256). Still, it should be noted that every commissioner who insisted in the course of the proceedings upon any question on whatever subject—upon any question which petitioner refused to answer—voted against petitioner at the end of the proceedings (even after the committee chose either not to mention his particular question in its report or to rule it out of its consideration). (See Note 61, this Brief).

[42] No doubt the Illinois authorities appreciate the feelings of Thomas Carlyle who, when clearly shown up in an error, admonished his critic, "Young man, you are heading straight for the pit of Hell." Still, it must be pointed out, four of the six members of the character committee who voted for petitioner in 1959 had signed the unanimous committee report against him in 1954.

[43] Thus, the chairman of the sub-committee conducting the examination of petitioner informed him, "It has been pointed out before to you, that the mere fact that a question is asked does not indicate that other people would have asked or approved that question, nor does it indicate that any particular weight will be attached to the answer or failure to answer the question . . . " (R. 237).

swer and which the Illinois bar authorities would just as soon forget about.[44]

Nevertheless, petitioner's application has been denied and an opinion written to justify this rejection. Since reasons were not to be found in the case as it stands to justify the action taken, another course had to be followed: the author of the *per curiam* opinion of the court below was reduced to discussing a case that had no basis in the record. This is why that opinion has so unrealistic and formalistic a tone; and this, in turn, is why Mr. Justice Bristow's dissenting opinion is as startlingly effective as it is: he takes the record seriously and talks about the case and about petitioner's qualifications, rather than confining himself to an abstract discussion of the threats of Communism and of cases that have little if anything to do with the problem of admission to the bar.[45]

---

[44] But, it might now be argued, the Illinois bar authorities do not insist that an applicant must answer every question asked him; rather, they insist only upon those questions which, after extended reflection and deliberation, the character committee decides the applicant should have answered. Even if one overlooks the difficulty faced by an applicant who must predict which questions the committee might later vote to take seriously, the problem remains (to which we return again and again), why should these specially designated questions be singled out in this case, as distinguished from the other unanswered questions? Is it because of any evidence the committee had, or because of petitioner's views on the right of revolution and the Declaration of Independence?

Whatever selectivity the committee later exercises, it is prejudicial for an applicant to have to resist even clearly improper inquiries on the part of the committee, if only because the committee is not accustomed to such a reliance upon personal judgment on the part of applicants appearing before it (See Note 61, this Brief).

[45] Great reliance is placed by the Illinois bar authorities on the *Beilan* and *Lerner* cases, 357 U.S. 399, 468. But the *Beilan* and *Lerner* situations seem clearly distinguishable from bar admission matters. For *Beilan* and *Lerner* do no more than apply a public employees doctrine that had been long established by cases such as

B. The lack of a foundation and various "incidental" objections.

The due process and equal protection clauses of the Fourteenth Amendment seem to offer additional restraints on the attempt by Illinois to put undue emphasis upon the questions petitioner has refused on principle to answer.

It would seem, in the first place, that a foundation must be established for a kind of question that is not usually associated with the primary "character and moral fit-

---

Adler v. *Board of Education*, 342 U.S. 485, and *Garner* v. *Los Angeles*, 341 U.S. 716, when the bar admission cases of *Schware* and *Konigsberg* were decided. *Beilan* and *Lerner* deal with situations where, partly because of the statutes involved, a refusal to answer questions was regarded as *ipso facto* disqualifying for public employment. A refusal to answer constituted incompetency, and even substantial obstruction; a warning to this effect was clearly given by the state authorities; and the record is primarily devoted to this warning. In addition, these two cases deal with situations in which evidence of the proscribed affiliations was in the record. Professors Kalven and Steffen, in Section II of their *amici* brief in the court below, develop these distinctions (R. 501-508).

The *Barenblatt* case, 360 U.S. 109, which is also relied upon below to justify the ruling on petitioner's application, is disposed of by Mr. Justice Bristow in his dissenting opinion (Appendix, Pet. Writ. Cert., 67):

> . . . It is one thing to sustain the constitutionality of subversive affiliations questions when they are propounded to one identified as a Communist, and submitted by an Un-American Activities Committee of the United States Congress, charged with discovering communist infiltration. It is quite another thing, however, to sanction such questions when asked of one against whom there is not a scintilla of evidence of subversive affiliations, and when the questions are submitted by a bar admission committee, charged only with ascertaining applicant's moral character, and in no way authorized by statute or rule of court to investigate or reject members of any political persuasion from the profession.

Similar considerations would seem to govern *Uphaus* v. *Wyman*, 360 U.S. 72.

ness" concern and function of the committee.[46] Most of

[46] The Illinois bar authorities have ignored the traditional "moral character" tone of terms such as "character and general fitness" and have also engrafted political tests upon the simple oath "to support the Constitution." Thus, they have refused to employ words with that precision which they had come to assume in a legal context but have substituted an emphasis that rests upon vague and indefinite notions about political affiliations and suspected philosophical ideas and opinions. This departure from the established meaning of these terms, and from the accepted purpose of these committees, raises serious questions about due process of law. *Jordan* v. *DeGeorge*, 341 U.S. 223, 230-232. Especially is this so in circumstances where *ex post facto* and bill of attainder considerations may be applicable. Cf. *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277.

That the "moral character" concern is primary and dominant in Illinois is suggested not only by the name of the committee but also by the language of the rule (or statute) establishing the committee (set forth, above, at page 7). Thus, the terms used are, "character and moral fitness," "good moral character and general fitness," "moral character and good citizenship" ("good citizenship" inquiries seem to have been traditionally directed, if the standard application forms provide a clue, to the applicant's military and civic record and to his understanding of the principles underlying the Constitution of the United States, of the principles underlying the Constitution of the State of Illinois, and of "the obligations of good citizenship" (R. 381-382)).

The standard applicant's questionnaire items reinforce this emphasis upon "moral character" as do the questions on the standard forms executed by character references, employers and the officials of educational institutions attended by the applicant (R. 388-414). On these forms the terms used are, "moral character and general fitness", "reputation or character of the applicant", "honesty", "integrity", "general conduct", "worthy of the highest trust and confidence", "traits of mind and character"; particularly significant is the one example used, "Would you recommend him as the guardian of a minor's estate?" Admittedly, various political tests can be rationalized as serving the purpose of investigating an applicant's honesty, integrity, etc. But such tests are foreign to the dominant concern and spirit of "moral character". Cf. R. 72-73.

It should be acknowledged that character references *are* asked whether they have "ever heard any question raised as to applicant's adherence to and support of the principles of the Constitution of the United States." But, as with the inquiry about the principles underlying the Constitution which is found in the applicant's questionnaire, the emphasis seems again to be on general principles, not on partisan

the questions asked by the committee in the usual course of its business, which are elaborations of and related to those included in its standard application questionnaire, do not require such a special foundation or justification.[47] But a serious problem is presented when inquiries are novel, especially when they intrude into sensitive or controversial political and religious areas.[48] The problem

---

political issues or on political affiliations. This is a distinction that petitioner has respected: he has cooperated fully with the committee by speaking at length on his understanding of the principles of the Constitution and on his conception of good citizenship (see Note 18, this Brief); he has consistently refused to answer questions about political affiliations (thereby, he believes, demonstrating his willingness really to support the Constitution).

Thus, we suggest, it would be well for character committees to restrict themselves to their dominant moral character concern: it is evident in petitioner's record that committee members have neither the training nor the experience to conduct political inquisitions with any degree of sophistication or self-restraint. They do know from their years at the bar how and why some lawyers betray their profession—and it is this experience, not dogmatic generalizations about "subversives", that they have been commissioned to draw upon in their capacity as members of committees on character and fitness.

[47] Most of such questions have had foundations established for them by usage or by the accepted purpose of the character committee (and therefore do not require justification in the special circumstances of the particular proceeding). Thus, an incomplete questionnaire would normally obstruct the operation of the committee, especially when the omitted information dealt with such essentials as the name, age, addresses, academic history, police record, etc. of the applicant.

[48] See *Sweezy* v. *New Hampshire*, 354 U.S. 234, on the need to lay a foundation for questions that, on their face, invade certain constitutional rights. This caution is implicit in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 639, where it is said:

> . . . The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedom of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

A "foundation" was laid for the first political question petitioner refused to answer during the current proceedings by establishing

is made even more serious when the questions (novel or long-acquiesced-in) are of a test-oath nature and, as such, arouse conscientious and plausible resistance on the part of even the most "innocent."[49]

No attempt has been made to show why the unanswered questions are necessary or even useful in the context of this case, why they should be asked generally of ap-

---

first that petitioner was of Greek descent! (R. 27). It had just been learned that petitioner was not a member of *any* Greek nationality group; but when the question was put in political terms, by reference to a particular organization which was said to be on "the Attorney General's list", petitioner returned to his position that he would not answer political inquiries (R. 28). The episode has been set forth at length in the Statement of the Case, at pages 13-16.

It is submitted that this episode, which reflects anything but fair play, is really symbolic of all the affiliations inquiries in this case. And yet the committee can suggest that petitioner's principled refusals to answer such questions interfere with a proper determination of his character and fitness. Everyday notions of due process, of how judicial bodies should regulate themselves, are sufficient to condemn behavior of this kind. See petitioner's 1959 brief in the court below, 8-12 as well as Appendix, Pet. Writ, Cert., 56.

[49] The novelty of these questions is emphasized by the repeated statements by the commissioner chairing the hearings that he did not know how this or that question would be regarded by other members of the committee when the time came to deliberate and vote. (Some of these disclaimers are italicized in the passages reproduced in the Statement of the Facts). One gets the impression, as he reads through the record, that the committee does not know what it wants. The applicant is left to guess what will be taken seriously and by whom during some distant deliberation by the committee. Indeed, the committee majority seem united only in their resentment at the fact that petitioner should exercise an independent judgment which permits him to know what *he* wants. Consider this Court's rulings in *Watkins* and *Sweezy*, which provide that a witness before a legislative committee or similar agency must be given, by some means, a fair basis for judging whether refusal to answer questions would be illegal. 354 U.S. 178, 234. This requirement is comparable to the constitutional requirement of reasonable clarity in the definition of crimes.

plicants,[50] why they should be asked of this applicant, or why a failure to answer them in any way obstructs the committee in its duty to pass upon petitioner's character and fitness as a lawyer. In fact, as we have seen, the committee in effect concedes it had no basis for putting these special questions even to an applicant about whom much more is known than is the case with the usual applicant.[51]

Incidental procedural due process objections—"incidental" only in the sense that they are overshadowed for the moment by petitioner's other objections—are to be seen in the refusal of the committee to abide by the previous ruling of the court below as to the areas to be inquired into during the rehearing;[52] in the repeated refusal

---

[50] Committee members casually express dogmatic generalizations about organizations and lists of organizations as if they had never heard of the presumption of innocence, of everyday judicial procedures and standards, or even of the rule of law. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123. It is obvious in the record, furthermore, that some organizations are asked about that are not known, even by name, to petitioner. We should not be surprised to learn that the committee, which seems to know no more about the unfamiliar organizations than does petitioner, could not have said what made these organizations "subversive". Indeed, what indication is there that these organizations are still in existence (if they ever existed)?

[51] The committee chairman admitted the Communist Party and other such questions are asked "in many cases" without foundation or "out of the blue" (R. 233):

> . . . the question has frequently been asked where there is no indication on the face of the questionnaire, and the answers thereto, or the affidavits, or of the discussions up to that point, as to the man's having been or even suspected of being a member of various organizations of that nature.

[52] This objection is spelled out in petitioner's 1959 brief in the court below. See, also, Note 5 (this Brief).

This order of the court is the nearest petitioner has come to securing anything like a pleading, showing him what the case is about and what to expect. Neither the committee report nor the opinion of the court below addresses itself to the complaint of petitioner that the affiliations inquiries were outside the scope of inquiry laid down by the 1957 order of the court below. (The language of this order should be compared with that of Commissioner Rothschild's

by the committee to comply with petitioner's requests that he be notified of the subjects to be covered during the rehearing and from one session to the next;[53] and in the refusal by the committee to acknowledge all the evidence favorable to petitioner collected by members of the committee.[54]

---

dissent that preceded it. Appendix, Pet. Writ. Cert., 6, 7). This refusal to abide by carefully designated limits—by "the law of the case"—reinforces the due process objections made by petitioner.

Both Mr. Justice Bristow and the committee minority point out that the committee majority made findings favorable to petitioner on all matters designated for inquiry in the 1957 rehearing order of the court below (Appendix, Pet. Writ. Cert., 64, 28-29).

[53] See, *e.g.*, petitioner's letters of March 3, 1958, March 27, 1958, and April 15, 1958 (R. 61, 119, 438).

[54] See, *e.g.*, the exchange of letters of April, 1959 (R. 473-475), which is supplemented by petitioner's report to the court below in his 1959 brief in that court (pp. 16-17):

> . . . I have received additional information about more contacts of the kind I describe in my letter of April 16 [1959]. It even seems that individuals who had submitted character affidavits on my behalf were questioned about me by individual members of the Committee who were either acting officially or improperly (Committee Rule 15) . . .

The disposition of the committee to suppress evidence favorable to petitioner is not new. See R. 49-50 and the elaboration thereupon in petitioner's letter of March 27, 1958 (R. 115-117). See, also, Note 27 (this Brief).

Professor Sharp's comment upon this behavior of the committee would apply as well to the other "incidental" objections that have been listed here ("Freedom and a Free Bar", 17 Lawyers Guild Rev. 45 (1957)):

> An investigator purporting to represent the committee appeared in Mr. A.'s home town, and asked friends and neighbors about Mr. A.'s qualities and record. Word of the matter came naturally to Mr. A. He repeatedly asked for the report. The committee did not deny that it had been made, nor raised any question about the authority of the investigator, but they refused to let Mr. A. see a copy of the report. The report was almost certainly favorable. Nevertheless, as every representative of business knows, similar action by an administrative agency charged with regulation of business would be a violation of those elementary decencies of procedure properly held to be safeguarded by the due process clauses of state and federal constitutions. This is a reminder of the eerie proceedings of Franz

Implicit in much of what is said in this Brief and reflected in the artificiality of the problems discussed in the opinion of the court below is perhaps the most serious criticism that can be leveled against any judicial body: we refer to the disturbing tendency of the Illinois bar authorities to ignore the case made by petitioner.[55] This is disturbing in that it subverts the reliance upon reason to which the bar should be committed and upon which the law must depend.[56]

Kafka's *Trial* and of the consequences which may be expected from the extension of loyalty and security proceedings in schools, industry and government, to the Bar.

It is against this background of clandestine informal (and even formal) investigations and of suppressed evidence that the complaint of the committee (which was repeated by the court below) must be assessed (App., Pet. Writ. Cert., 24, 39):

> In the course of the rehearing proceedings, the Committee conducted no independent investigation into applicant's character, reputation or activities. The Committee has no personnel nor other resources for any such investigation . . .

[55] We have suggested that the opinion of the court below would have been much more appropriate at the time of (and in lieu of) its 1957 decree ordering this rehearing: at that time there would have been no record and arguments related to the long examination of petitioner to take account of. This suggestion is reflected in Mr. Justice Bristow's remonstrance (Appendix, Pet. Writ. Cert., 77):

> Before concluding this dissenting opinion, I am constrained to note that it is hardly consistent with judicial objectivity for the *per curiam* opinion to have overlooked every item of positive evidence submitted in support of establishing applicant's good moral character.

[56] Several well-known stories from across the centuries seem to petitioner to throw light upon the extent to which practical life can be expected to rely upon reason.

In the carefully designed *Stanza della Segnatura* in the Vatican, one of the scenes executed by Raphael is of the Judgment by Solomon. The orientation of this scene, including the direction which even Solomon must ultimately look for guidance in dispensing justice, is toward Philosophy which is represented on an adjacent wall.

Classical mythology reports the opposition of Athene and Poseidon: this opposition is reflected in the epic struggle of Odysseus to return to Ithaca; it is celebrated in the West Pediment of the Parthenon with its contest between the two gods over the naming (and, hence,

C. The relevance of the Konigsberg and Schware cases.

An aspect of procedural due process seems to be involved as well in the refusal of Illinois to abide by the law of the land with respect to bar admission matters, the rulings of this Court in the *Schware* and *Konigsberg* cases three years ago. Serious problems are created by the refusal of a committee on character and fitness to be anything but scrupulous toward the decisions of this Court.[57]

---

possession) of this city. Poseidon can be taken to represent the human passions, deep, restless and powerful as the sea; Athene, on the other hand, reason and wisdom. The contest will continue so long as men endure: there is enough of the "Poseidonic" in every man and every doctrine to make a permanent resolution or settlement impossible. But there are better and worse times, men and doctrines, depending in part on the role that Reason and Practical Wisdom are permitted and able to play in human affairs.

It is prudent, furthermore, to recognize that there may be inevitable tensions between practical life and a life based on reflection:

> For you know well, men of Athens, that if I had actively engaged in the affairs of the state, I would have perished long ago and neither to you would I have been of any use whatever nor to myself. And do not be offended at my telling you the truth: for the truth is, . . . he who will really fight for the right, if he is to be spared even for a while, must act as a private citizen and not in a public capacity.

If the reader is annoyed at the intrusion of the speculations of this footnote into a "practical" brief, he can appreciate at first hand the not altogether unjustified reaction of the character committee upon first being confronted by petitioner's unlawyerlike principles and mode of discussion.

Indeed, petitioner's underlying folly in his encounter with the Illinois bar is implicit in the argument of this footnote. (See, *e.g.*, R. 119)

[57] In Illinois, petitioner pressed his application for a rehearing in 1957 on the mistaken assumption that the local authorities would set him an example in law-abidingness. In California, the bar authorities resorted to technical evasions of the mandate of this Court. In New Mexico, we understand, Mr. Schware again encountered opposition upon endeavouring to take advantage of the unanimously-supported mandate of this Court and thereupon decided to abandon the legal profession—he, at least, seems to have quit while still ahead.

We have already suggested the bearing of the *Schware* case on petitioner's matter. The present scope of the *Konigsberg* case will no doubt be examined in the case set down for argument immediately after petitioner's. If *Konigsberg* remains authoritative, then there should be no difficulty with petitioner's case: (1) nothing is wrong with petitioner's views on the right of revolution and the Declaration of Independence;[58] (2) no satisfactory reason has been given by Illinois why the unanswered questions about political affiliations should be insisted upon or why these questions should make any difference in petitioner's case; (3) no "warning" was given, or could reasonably have been given, that refusal to answer a committee question would be considered obstruction *per se* so as to prevent the committee from being able to pass on petitioner's qualifications[59]—in short, there is no basis

---

[58] The concern of the committee majority about petitioner's attitude toward the enforcement of judicial decrees is not justified by the record. Petitioner had simply indicated that there may be judicial decrees, as well as actions on the part of the executive or the legislature, which might conceivably justify resistance (R. 161-167, 211-220). It is true that Mr. Konigsberg disavowed revolution in all circumstances, present or future, whereas petitioner has repeatedly endorsed the Declaration of Independence. But this is hardly a distinction that should have any adverse effect upon an evaluation of petitioner's character and fitness.

Indeed, the record indicates, petitioner's views on this and other subjects seem to qualify him for inclusion in the category of "law-abiding traditionalist" which Mr. John R. Starrs concludes "is probably as close as we are going to be able to come . . . to reducing the concept of the man of good moral character to a few words." 18 Univ. Detroit L. J. 195, 206 (1955). See, for Mr. Starrs's comment, on petitioner's case, Note 57 *et seq.* in his article.

[59] During the course of petitioner's examination by the committee, the chairman of the committee, at every point where the significance of a refusal to answer questions was discussed, conceded implicitly or explicitly that such a refusal was but one piece of evidence to be evaluated as part of the record. (R. 30, 102-103, 135, 237, 294; also R. 4, 6, 34, 190). A careful examination discloses that there is not in the record any warning that a refusal to answer a particular question would be sufficient grounds for exclusion. Such

for distinguishing to petitioner's disadvantage his case from Mr. Konigsberg's.

But, independent of the final disposition or even of the existence of the *Konigsberg* case, it is once again submitted that petitioner has clearly established his character and fitness for bar admission purposes.[60] We pre-

---

a warning (based on a rule or statute, of which there is no such in Illinois) would have to be given in order to justify an avoidance of the holding of the *Konigsberg* case, 353 U.S. 253, at 261. If, however, the warning referred to in the *Konigsberg* opinion is considered to have been given petitioner and if petitioner's other Fourteenth Amendment objections are discounted, then this Court would seem to be faced with the problems that were set aside as unnecessary to reach in the *Konigsberg* case, the "far reaching and complex questions relating to freedom of speech, press and assembly." These freedom of speech questions are discussed in Section II of this Argument.

One of the most puzzling aspects of this case is seen in the committee argument that an exchange of letters between the committee and petitioner in September 1958 (four months after the hearings had concluded) deprives petitioner "of any benefit from the decision in the *Konigsberg* case." (Appendix, Pet. Writ. Cert. 20). These letters are set forth at R. 441-447. (See Note 45, this Brief). The authors of this passage in the committee majority report must have relied on a mistaken recollection of what these two letters contain. Not the least curious aspect of the committee majority report is the remarkable suggestion that an applicant who disagrees with the committee majority in interpreting or applying the opinions of this Court is thereby to be considered of dubious character. Appendix, Pet. Writ. Cert., 27. We suspect that the desperation evident in these maneuvers reflects the belated realization by the committee that no unequivocal warning had been, or in the nature of things could have been, given during petitioner's appearances before the committee.

[60] Commissioner Rothschild recognized in his 1957 dissenting opinion that petitioner's position with respect both to the right of revolution and to answering certain kinds of questions had remained the same since 1950 and had not been specially adapted to the rulings of this Court in subsequent cases. Appendix, Pet. Writ. Cert., 5.

The many references to the *Konigsberg* case in this Brief should not conceal the fact that in certain essential respects petitioner's case is more like the *Schware* case: the role of the unanswered questions

sume to suggest, however, that it would be well for this Court, irrespective of petitioner's matter, to reaffirm its decision in the *Konigsberg* case, if only to discourage those who are disposed to think that either technical evasions or obvious defiance of this Court's decrees can prove successful.

II. Freedom of Speech and the Free Exercise of Religion.[61]

Even more basic constitutional considerations than petitioner's due process arguments are objections that draw upon the First Amendment. That is to say, the States

---

is minimized if not virtually ruled out here by the admissions made by the committee; the striking impression that remains is the refusal of the committee to give due weight to the "dictates of reason" and to the overwhelming character of the evidence in the light of the "character and fitness" purpose of the committee (353 U.S. 232, at 249).

[61] The committee was obliged, after a grievous research blunder by one of its members, to rule out of its consideration petitioner's refusal to answer questions about religion. (R. 137-138, 185-194, 256). But anyone familiar with human nature must realize that petitioner won no support from men who were shown to be so obviously in error that their colleagues took the unprecedented step of repudiating their questions. (See Note 41, this Brief). Mr. Justice Bristow's comment reflects the serious problem of religious freedom implicit here (Appendix, Pet. Writ. Cert., 58 59):

> This precise point, that refusal to answer may be indicative of good character, is evident in the record. Applicant courageously and properly refused to answer the unconstitutional religious inquiries. . . . This line of inquiry, persisted in since the very first session, and apparently based upon an 1856 decision, was later admitted by the committee to be improper and unconstitutional since 1870.
>
> The *per curiam* opinion completely overlooked this portion of the record. I cannot follow that course, particularly since the record shows that applicant's refusal to answer these religious questions had so prejudiced the committee that one member stated that the refusal to answer had a "substantial bearing on his [applicant's] fitness to practice law." Such prejudice could hardly be wiped out by the statement of the chairman that these improper questions would not be taken into consideration.

are said to be obliged not to abridge the rights of citizens to freedom of speech and to the free exercise of religion.[62]

Petitioner has been penalized, throughout his association with the Illinois bar, for the expression of his views on the Declaration of Independence and the right of revolution.[63] It was only because committee members took

---

[62] This doctrine can be traced back, through cases such as *West Virginia Board of Education*, 319 U.S. 624, and *Cantwell* v. *Connecticut*, 319 U.S. 296, to *Gitlow* v. *New York*, 268 U.S. 652. Although petitioner has serious reservations about the policy of the Fourteenth Amendment as interpreted in the *Gitlow* case, he recognizes that some such limitation upon the States must be insisted upon so long as Congress does not acknowledge and exercise the power that seems to have been given it under the First Amendment to ameliorate or remove state abridgements of the freedom of speech. Similarly, this Court has an obligation (in petitioner's view) either to review for their wisdom as well as constitutionality restrictions upon entry into the state bars or to provide means by which qualified citizens might be admitted directly to the bar of this Court and to the federal bar without prior admission to the bar of any State. (See Note 76, this Brief). Direct admission of petitioner to the bar of this Court is included in the request for relief set forth in the Conclusion to this Brief.

Petitioner discusses the problem of the proper relation between State and Union with respect to freedom of speech in a PhD dissertation which is nearing completion, *Notes on the First Amendment*. It is sufficient and appropriate for his purposes here, however, to accept the orthodox view on this problem. (It should be further noted that there is no doubt that the Constitution of Illinois guarantees the right to freedom of speech against any infringement by the State of Illinois, Art. II, Sec. 4. This prohibition alone would be sufficient to justify an applicant's condemnation as unconstitutional the committee's inquiries about political affiliations. See, also, Art. V, Sec. 25, Constitution of Illinois).

[63] Even the court below, in its 1957 mandate ordering the present rehearing, recognized (Appendix, Pet. Writ. Cert., 7, 37):

> The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California*, 353 U.S. 252, and *Yates* v. *U. S.*, 1 L. ed. 1356. . .

offense at petitioner's views on this subject (which were elaborated in response to questions) that he was asked about his affiliations in the first place.[64] Continuing resentment toward his perfectly proper views on rightful rebellion is to be seen throughout the present record and crops out several times both in the committee majority report and in the *per curiam* opinion of the court below.[65] But if anything is protected by the First and Fourteenth Amendments against attack by the States, surely it must be the expression of that fundamental American political opinion,[66] a belief in the Declaration of Independence and the right of revolution.

Furthermore, it has been long recognized that the protection of political opinions extends to the political organizations devoted to the advancement of those opinions. It is not difficult to appreciate that effective protection of the expression of political opinions, especially in the large modern state, must include protection of the means by which such opinions are promulgated and advanced. It would seem, therefore, that the Communist Party and

---

[64] This sequence is set forth in detail in petitioner's Closing Argument, R. 320-331. Compare the mistaken version to which the court below seems to consider itself committed, Appendix, Pet. Writ. Cert., 35-36. (See Note 28, this Brief).

Petitioner expressed his views on the subject of the right of revolution and the Declaration of Independence during the current rehearing only after his objections against such discussion were overruled by the committee. (R. 145-147, 148-157, 164-167, 207-220, 341-342, 347-348). See Note 18, this Brief, for an explanation of why petitioner cooperated fully with the committee with respect to this inquiry.

[65] Appendix, Pet. Writ. Cert., 14-16, 40-41. It is clear in the record that the resistance to court decrees, of which so much is made, is put in terms of restoring or protecting constitutional government and is perfectly consistent with loyal support of the Constitution. (R. 161-167, 211-220; Appendix, Pet. Writ. Cert., 55).

[66] See Dr. Laurence B. Berns' thoughtful *amicus* letter in the court below. (R. 493-497). See, also, R. 278-280.

the Ku Klux Klan would be entitled to such protection, even to the extent that inquiries relating to those organizations would (except in special circumstances) constitute an abridgement of the freedom of speech both of the community at large and of the citizen to whom such inquiries are directed.

However the matter is viewed when a known member of the Communist Party or of the Ku Klux Klan seeks admission to the bar,[67] it should be a much easier case when there is the explicit denial by the character committee of any suggestion that the applicant before it is such a member. Does not freedom of speech extend to the right to refuse to affirm or deny on threat of civil penalty any set of opinions or affiliations of a political nature?[68] That is to say, is not one protected in the right to preserve silence on such matters, in the right not to speak? Cannot this be regarded as a citizen's way of speaking, of protesting against unconstitutional and ungentlemanly developments, against developments that promise nothing but further harm to his country and chosen profession? Such is the rhetoric of the historic opposition to the test oath.[69]

---

[67] "As we said before, the mere fact of Konigsberg's past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character." *Koningsberg v. State Bar*, 353 U.S. 252, 273.

[68] If only the "guilty" are protected in this respect, then the First Amendment tends to become indistinguishable from the popular view of the Fifth Amendment.

[69] The legitimacy and respectability of such refusals as petitioner's are evident to anyone familiar with the traditional attitude toward test or loyalty oaths. (See *Story on the Constitution*, 5th ed. 1891, Sections 1847-49; *Encyclopedia Brittanica*, 14th ed., "Test Acts", Vol. 21, pp. 976-977; *Catholic Encyclopedia*, ed. 1912, "Test Oath, Missouri," Vol. 14, pp. 538-39). This Court, in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, has indicated, as did the dissenting opinion (319 U.S. at 663-64), that that attitude is not

The concession by the committee that it has no adverse evidence points up the element of protest in petitioner's refusal to answer certain kinds of questions and hence emphasizes the problem of freedom of speech raised by this case. This concession—that the committee has never had suggested to it any evidence linking petitioner to any "subversive" organization—points up as well the significance of petitioner's views on the Declaration of Independence in his decade-long exclusion from the bar.

Whether or not petitioner is correct in his constitutional views, there cannot be any doubt that he believes himself to be acting in defense of the constitutions of his state and of his country.[70] Nor can it be doubted that there is substantial authority in the opinions and decisions of this Court to lend support to the constitutional views he has relied upon.[71] Thus, it should be recognized that the

---

without foundation in constitutional law. Additional indications of the traditional attitude are seen in Art. VI, Constitution of the United States (religious test prohibition); Art. V, Sec. 25, Constitution of Illinois (exclusive oath provision); *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277. (See, also, 37 A.B.A.J. 123 (1951), a letter from respected lawyers in opposition to the proposed American Bar Association anti-Communist loyalty oath. Still, a loyalty oath would be generally preferable to the kind of examination undergone by petitioner: the text of the oath is available for inspection and deliberation; one knows what he is confronted by; allowances do not have to be made for the peculiarities and prejudices of individual examiners.)

[70] There is exhibited in the record one of the dangers against which petitioner's position is designed to guard: government officials become accustomed to asking about affiliations with unpopular political organizations and, before long, they find themselves acquiescing in questions about religion, about a bar applicant's understanding of what is said to be Marxist and Leninist doctrine, as well as in questions relating to the Republican and Democratic Parties. See Notes 23, 61, and R. 81, 156. Once again it can be seen that the first compromises, which are so enticing, are the most treacherous.

[71] E.g., *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624.

First Amendment might prohibit the kind of inquiries insisted upon by the character committee or at least protect petitioner in his resistance to such inquiries and in his defense of the Declaration of Independence.[72] But whatever the validity of petitioner's constitutional views, there is nothing in his position and in the arguments that have been used to support it either to suggest he is unfit to practice law or to negate in the slightest the overwhelmingly favorable evidence in the record with respect to his character, fitness and citizenship as an applicant for admission to the bar.[73] And this, it should be remembered, is all anyone claims the committee is empowered by law to pass judgment on.[74]

III. Toward a Truly Responsible and Law-Abiding Bar.

It is fitting as we draw to the end to comment upon the concluding remarks in the *per curiam* opinion of the court below. It is there suggested that petitioner "failed to respond to the higher public interest" and that he has been guided only by his "purely personal interest" in

---

[72] "Government censorship can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of determining 'moral character,' than if it should be attempted directly." *Konigsberg* v. *State Bar*, 353 U.S. 252, 269.

[73] See *Application of Murra*, 166 F. 2d 605 (7th CCA, 1948), 178 F. 2d 670 (7th CCA, 1949), where an application for naturalization was approved even though the applicant had refused to answer certain questions put to him upon being examined before the Immigration and Naturalization Service.

[74] Professor Wilber Katz's comment to the committee, when he appeared before it in the course of petitioner's 1950-1951 hearing, is still appropriate (Record filed in this Court, 1955, p. 69):

> The way in which the Committee conducts its inquiry, the type of inquiry the Committee conducts, puts an Applicant who has the views he does as to loyalty oaths and inquiry of that kind into the dilemma where he must abandon that principle or run the risk of not carrying the burden of persuasion . . . I should think the record would permit a finding that he has sustained the burden.

following the course he has taken. Unfortunately, this ungenerous suggestion does a disservice to the State of Illinois in that it really denies the possibility of public-spiritedness by degrading to the most selfish level the conduct and aspirations of her citizens.

It is difficult to see what merit there is to this suggestion if words such as "purely personal interest" are used in their ordinary sense: petitioner first took the position he did during the darkest days of the Korean War, at a time when he had no known supporters and little chance of success; not only has his legal career been interrupted if not permanently ruined but university and law school teaching alternatives have been almost completely unavailable as a result of his differences with the Illinois bar; and his net loss of income over the past decade—if it is remembered that he ranked very high academically in his law school class—must be well over fifty thousand dollars.

It must be at once conceded, however, that these personal sacrifices are trivial when compared to the higher public interest to which petitioner has tried to devote himself. Once again petitioner commends to this Court's attention his Closing Argument before the Committee on Character and Fitness (R. 314). He is satisfied that he has not only acted as a man should but may even have had the good fortune to be able to make a contribution to constitutional government and the rule of law.

Genuinely serious problems confront the bar. These problems, which have little to do with the far-fetched but yet crippling issue of "subversives in the bar," have been defined by petitioner in the following terms:[75]

---

[75] Anastaplo, Review: Drinker, *Legal Ethics*, 14 Law. Guild Rev. 144 (Fall, 1954) (submitted to the committee, R. 123-124).

"Most of the serious criticisms that have been leveled against lawyers and the law reflect doubts about the lawyer's appreciation of the nature of justice. The enduring quality and source of such criticisms suggest that there may be basic defects in the lawyer's make-up or role as now conceived. If so, a basic re-evaluation—a look at first principles—might be in order. And this suggests, if anything of significance is to be developed about what the lawyer should be, the need for a consideration of the place of philosophy in the legal community and in the society. Works [on legal ethics], with their detailed description of the efforts at self-control by the Bar, testify to the existence of an awareness of moral distinctions from which the philosopher must work in his consideration of practicable rules of conduct.

* * *

"We have suggested that the moral standards of the lawyer are, for the most part, both conventional and unexamined. Yet, if the conventional morality were taken even more seriously by the Bar and its committees, it would serve as an indication of a wider interest in these matters on the part of the practitioners. [As has been pointed out,] 'One of the principal reasons for the public's suspicion of lawyers is the justified belief that lawyers and judges are loath to proceed against lawyers known or strongly suspected of wrongdoing.' But no matter how vigilantly the Bar proceeds along its present course, it may be that the merits of even conventional morality must remain unappreciated until enough young lawyers are led to regard as vital such problems as whether it is better to do than to suffer injustice. If there is to be serious inquiry into these problems, thoughtful and responsible lawyers should appreciate the need to restrain those complacent, impulsive and sometimes powerful colleagues who would keep much of the life of the Bar unexamined.

"Fundamental improvements in the general standards of the legal profession cannot be brought about quickly, if at all. In the meantime, we hope to continue to see followed the guidance and example of those lawyers who act decently and according to time-honored precepts. In fact, for all we know, most members of the bar should never be expected to do more than imitate the more esteemed of their fellows. Perhaps, indeed, the contribution of the philosopher consists in offering what counsel and assistance he can to those who have always esteemed as an example of the good man one who obeys the injunction 'to do justly, and to love mercy, and to walk humbly with thy God.'"

Conclusion.

For the foregoing reasons, relating to both the common good and individual rights, it is requested that this Court provide for petitioner's admission to the Illinois bar, preferably with the status of an attorney retroactive to that morning in November of 1950 when this case unexpectedly began. In addition, petitioner again advances the suggestion that he be admitted directly and at this time to the bar of this Court, independently of the action Illinois might be induced to take. Such direct admission would insure one remedy that this Court can provide without having to depend on the sometimes reluctant cooperation of a state court.[76]

---

[76] The rationale of direct admission is suggested in Note 62 of this Brief. We understand that disbarment by federal courts does not automatically flow from disbarment by state courts. Should not this Court insist in appropriate cases upon a like independence of the state courts' determinations with respect to bar admissions? Additional discussion of petitioner's proposal is to be found in the 1955 papers submitted by him to this Court (Jurisdictional Statement, 39-40; Petition for Rehearing, Notes 10, 11; Motion by George Anastaplo for Leave to File an Application for Admission to the Bar of the Supreme Court of the United States (denied, 349

Thus, this Court is again offered the opportunity not only to endorse but even to extend the contribution that petitioner has attempted to make to a responsible and independent bar, and through the bar to his country.

Respectfully submitted,

GEORGE ANASTAPLO, Petitioner
Counsel *pro se*
6030 Ellis Avenue
Chicago 37, Illinois
DOrchester 3-4825

Athens
July 4, 1960

U.S. 903, 908)). See, also No. 8, Questions Presented for Review (this Brief).

Related to this proposal as well as to the review sought of the action by Illinois is petitioner's suggestion that this Court has the power and obligation to examine the methods employed in the state courts which supply the bar of this Court and to correct state action which excludes an applicant who is qualified to practice both in his State and before this Court. Such a power would seem to rest in the paramount judicial body in the United States and would be comparable to Congressional power to evaluate and correct State electoral requirements. Although the Congressional power is derived from an explicit constitutional provision, it provides a model for a Court that has never hesitated to enforce implied prohibitions against the burdening by States of federal instrumentalities. *McCullough* v. *Maryland*, 4 Wheat. 316. Of course, the power of States to admit is not, "while this Court sits," the power to deprive this Court of counsel. But this state power, if not examined scrupulously both for unwisdom as well as unconstitutionality by this Court in situations where marked departures from usual and accepted practices are evident, is the power to affect adversely the quality of the bar of the Supreme Court of the United States as well as of the subordinate federal courts which are more limited in self-protection. The assertion of any latent power to examine state bar admission policies and practices would be particularly appropriate in an era when scholarly research and judicial action seem to be limiting the scope of previously accepted constitutional limitations upon government action.

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 4 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

NO. 56

IN RE GEORGE ANASTAPLO,

Petitioner.

(ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.)

BRIEF FOR THE STATE OF ILLINOIS, RESPONDENT.

Certificate of Service.

Appendix.

WILLIAM L. GUILD,
Attorney General of the State of Illinois,
160 N. LaSalle Street, Suite 900,
Chicago 1, Ill. (Financial 6-4000),
Counsel for Respondent.

WILLIAM C. WINES,
RAYMOND S. SARROW,
A. ZOLA GROSS,
Assistant Attorneys General of Illinois,
Of Counsel.

INDEX.

PAGE

The Opinions Below 1

Respondent's Acceptance of Petitioner's Statement of the Case 2

The Questions Presented 2

Summary of Argument 4

Argument 10

I. Petitioner should have known at the time of his first appearance before Illinois' Committee on Character and Fitness, was explicitly told by a unanimous Supreme Court of Illinois on September 23, 1954, and was again informed by that still unanimous court on September 17, 1957 that he would not be eligible under Illinois' law for admission to the State's bar until he answered questions concerning his possible membership in or contacts with subversive or other criminal organization 10

II. Illinois does not deny petitioner due process of law by refusing to admit him to her bar until he answers questions concerning his possible membership in subversive or otherwise criminal organizations 18

A. Membership in or affiliation with a subversive or otherwise criminal organization, if such membership or affiliation exists, affords a constitutional ground for excluding petitioner from admission to the Bar of Illinois unless that membership or affiliation is explained 19

B. Illinois' requirement that petitioner directly answer questions concerning his membership in subversive or otherwise criminal organizations is reasonable and constitutional. Due

process does not require Illinois to accept any quantum of evidence, no matter how overwhelming, of petitioner's character and fitness as a substitute for personal and direct answers to such questions on petitioner's oath or affirmation 22

III. There is no basis for petitioner's assertion that he has been denied equal protection of the law .. 29

IV. The court need not answer the question whether petitioner may constitutionally be asked questions about his private "beliefs" or "views" as distinguished from his acts and conducts. But if the question is to be answered at all, it should be answered that Illinois may ask such questions 31

V. The record does not compel the conclusion that petitioner is a fit person to practice law 32

Conclusion 35

Appendix I—In Re Anastaplo, 3 Ill. 2d 471 37

Certificate of Service 47

TABLE OF CASES AND AUTHORITIES CITED.

In re Anastaplo, 3 Ill. 2d 471, 121 N. E. 2d 826 (1954) 4, 14, 37

In re Anastaplo, 18 Ill. 2d 182 ..... 16, 17

Barenblatt v. United States, 360 U. S. 109 22

Beauharnais v. People, 343 U. S. 250 21

Beauharnais v. Illinois, 342 U. S. 809 ..... 5, 21

Beilan v. Bd. of Education, 357 U. S. 468 ..... 6, 22, 25

Dennis v. United States, 341 U. S. 495 ..... 5, 20

In re Heirich, 10 Ill. 2d 357, 140 N. E. 2d 825 17

Konigsberg v. State Bar of California, 353 U. S. 252 .. 10, 15

Lerner v. Casey, 357 U. S. 468 ..... 22, 25

In re MacCallum, 391 Ill. 400 17
People v. Illinois, 408 Ill. 512 5
People v. Spies, 344 Ill. 586, 176 N. E. 732 ..... 5, 21
People v. Spies, 122 Ill. 1, aff'd Spies v. Illinois, 123 U. S. 131 ..... 5, 21
Spies v. Illinois, 123 U. S. 131 ..... 5, 21
In re Summers, 325 U. S. 561 ..... 10, 35
Uphaus v. Wyman, 360 U. S. 72 ..... 6, 22
Ill. Rev. Stats., 1959, Ch. 127, Par. 166 (b), Vol. II, p. 1914 ..... 6, 23
Ill. Rev. Stats., 1959, Ch. 35, par. 47 5
Ill. Rev. Stats., 1959, Ch. 32, par. 47 20
Constitution of Illinois, Article XII, Sections 1 and 6 ... 13
Appendix I—In Re Anastaplo, 3 Ill. 2d 471, 121 N. E. 2d 826 (1954) 37

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

NO. 58

IN RE GEORGE ANASTAPLO,

Petitioner.

(ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.)

BRIEF FOR THE STATE OF ILLINOIS, RESPONDENT.

THE OPINIONS BELOW.

The petition for *certiorari* does not cite under the heading "The Opinions Below" or reproduce as an appendix the first opinion of the Supreme Court of Illinois in this case, *In re Anastaplo*, 3 Ill. 2d 471, 121 N. E. 2d 826, decided September 23, 1954.

Accordingly, that opinion is reproduced in full as Appendix I to this brief.

RESPONDENT'S ACCEPTANCE OF PETITIONER'S STATEMENT OF THE CASE.

In the view of the Attorney General of Illinois, petitioner's Statement of the Case is unnecessarily replete with extensive quotations from the record of petitioner's rather fulsome and oratund expression of his arguments, views and positions and is not the plain and concise narration of facts contemplated by this court's rules and customary in the practice before its bar.

But petitioner's statement is not unfair or inaccurate. Therefore, we accept petitioner's Statement of the Case without corrections or additions.

THE QUESTIONS PRESENTED.

In the view of Illinois' Attorney General, the only questions that it is necessary or appropriate to decide upon the record in this case are:

1. WAS PETITIONER PLAINLY INFORMED AT ALL RELEVANT TIMES BY ILLINOIS' SUPREME COURT THAT HE WOULD BE INELIGIBLE FOR ADMISSION TO THE BAR OF ILLINOIS UNTIL HE MADE DIRECT ANSWERS TO QUESTIONS CONCERNING HIS POSSIBLE MEMBERSHIP IN OR AFFILIATION WITH SUBVERSIVE OR OTHERWISE CRIMINAL ORGANIZATIONS?

2. DOES ILLINOIS DENY PETITIONER DUE PROCESS OF LAW BY REFUSING TO ADMIT HIM TO HER BAR UNTIL SUCH TIME AS HE MAKES DIRECT ANSWER TO SUCH QUESTIONS?

3. DOES THE RECORD SUPPORT AND DID PETITIONER MAKE TIMELY ASSERTION OF HIS CLAIM THAT ILLINOIS HAS DENIED HIM EQUAL PROTECTION OF LAW BECAUSE OF HIS FAILURE TO ANSWER QUESTIONS SUCH AS THOSE INVOLVED IN THIS CASE?

The Attorney General of Illinois contends that the first of the questions stated above should be answered, "Yes, petitioner was plainly informed by Illinois' Supreme Court

that he would be ineligible for admission to the bar of Illinois until he answered questions of the sort involved in this case", that the second of these questions stated above should be answered, "No, Illinois does not deny petitioner due process of law by refusing to admit him to her bar until he answers such questions" and that the third question stated above should be answered, "No, there is no basis in the record for petitioner's present contention that Illinois has denied him equal protection of law, nor did petitioner make timely assertion of that contention in accordance with Illinois principles of practice, which principles are themselves constitutional."

Therefore the Illinois Attorney General submits that only the questions stated above need be answered.

But the arguments of petitioner and of *amici curiae* debate the following questions, which we answer although we do not deem it necessary or appropriate that this Court decide them:

4. MAY ILLINOIS CONSTITUTIONALLY CONDITION PETITIONER'S ADMISSION TO THE BAR OF ILLINOIS UPON HIS ANSWERING QUESTIONS AS TO HIS BELIEFS AND VIEWS ON THE RIGHT OF REVOLUTION SO LONG AS ANSWERS TO THOSE QUESTIONS, IF CANDID, MIGHT REASONABLY AFFORD THE BASIS FOR A REASONABLE INFERENCE AS TO WHETHER PETITIONER WAS CRIMINALLY SEDITIOUS OR OTHERWISE OF A CHARACTER UNFIT FOR THE PRACTICE OF LAW?

5. DOES FEDERAL DUE PROCESS COMPEL A FINDING UPON THE RECORD IN THIS CASE THAT PETITIONER IS A "FIT AND PROPER PERSON" TO PRACTICE LAW AT THE BAR OF ILLINOIS?

SUMMARY OF ARGUMENT.

Petitioner steadfastly declines to answer precisely the sort of questions that if he is admitted to the bar, it will be not only his right but his duty to ask and require prospective jurors to answer in cases involving alleged crimes of sedition should petitioner be called upon, by appointment of court or otherwise, to conduct such cases.

Should a prospective juror refuse (on grounds other than claim of privilege against self-incrimination) to answer such questions and should a court refuse to compel the *venireman* to answer them, both the defendant and the Government would be denied the rudiments of a fair trial by an impartial jury.

Illinois does not deny due process by withholding from petitioner a license to practice law until he answers precisely the kind of questions that it would be his lawyer's duty to compel other persons to answer.

I.

Although this court could say in 1957 in *Konigsberg* v. *State Bar of California*, 353 U. S. 252, that there was doubt as to California's requirement that applicants for admission to her bar must answer questions such as those involved in that case and in this case, there has never been any doubt at any time relevant to this case that petitioner has *actually known* that unless this court otherwise commands, petitioner will not be admitted to Illinois' bar until he answers personally, directly and on his oath or affirmation questions as to his possible membership in or affiliation with subversive organizations. The Supreme Court of Illinois so held in *In Re Anastaplo*, 3 Ill. 2d 471 (1954). By an order

in 1957, set forth in full under Point I of the Argument and reprinted in full, *In Re Anastaplo,* 18 Ill. 2d 182 at p. 186, the present opinion now under review, *In Re Anastaplo,* 18 Ill. 2d 182, the Supreme Court of Illinois has so held.

No amount of proof, however overwhelming, of petitioner's good character will suffice as a substitute for petitioner's personal and direct answers to these questions.

II.

A requirement barring members of the Communist Party, the Silver Shirts or the Ku Klux Klan from the roll of attorneys is constitutional. *Dennis* v. *United States,* 341 U. S. 494.

Illinois punishes with death not only persons actively participating in rebellions against her constabulary but members of a band having, to the knowledge of such members, armed rebellion for an object even though the members did not participate in or help to plot an affray ending in murder. *People* v. *Spies,* 122 Ill. 1, *affirmed, Spies* v. *Illinois,* 123 U. S. 131.

She also punishes concerted libel against racial minorities under a statute (Ill. Rev. Stats., 1959, Ch. 35, par. 47) that this court has held constitution. *Beauharnais* v. *Illinois,* 342 U. S. 809, *affirming People* v. *Illinois,* 408 Ill. 512. The Silver Shirts and the Ku Klux Klan have racial defamation as one of their objects.

Such putative seditious membership or affiliation, if unexplained, being not only a relevant area of inquiry but a ground that if it exists will disqualify petitioner *per se* from the roll of Illinois, attorneys, he has no constitutional "right of privacy" that will permit him at once to refuse to answer the questions involved in this case and to receive a license to practice law. This is true whether answer is refused on the ground of self incrimination, *Lerner* v. *Casey,*

357 U. S. 468, or a claim of constitutional "right of privacy." *Beilan* v. *Board of Education*, 357 U. S. 399. *Uphaus* v. *Wyman*, 360 U. S. 72.

Petitioner's suggestions and the contentions of *amici curiae* that Illinois has greater latitude of inquiry with respect to applicants for public posts than it has with respect to the right to practice law is well conceived in the abstract but is not pertinent to this case. Illinois may certainly forbid certain forms of political activities to employees that it could not forbid to lawyers engaged entirely in private practice.

But Illinois may certainly enforce norms of *loyalty and moral character* of lawyers that are at least as stringent as those that she may impose upon subway conductors, *Lerner* v. *Casey*, 357 U .S. 568, or clerical *personnel*.

Moreover, Illinois may require any lawyer to be eligible, so far as loyalty and character are concerned, for appointment to lawyers' posts in the public service. All employees of the State of Illinois are required to take an oath of loyalty under a State statute that petitioner does not challenge. (Ill. Rev. Stats., 1959, Ch. 127, par. 166(b), Vol. II, p. 1914.)

No member of the Supreme Court of Illinois found that the evidence in the instant case would support an *inference* that petitioner is a member of or affiliated with a subversive organization. Nor does the Attorney General of Illinois suggest that the evidence requires such an inference.

But the record does support an eminently constitutional *presumption* of subversive activity even though every *inference* from the record contradicts that presumption.

Inferences are a belief engendered in the minds of the triers of the facts and arise from evidence.

Presumptions operate in the absence of any evidence or in the absence of a *particular kind* of evidence that may

constitutionally be required even though there is demonstrative evidence of other kinds to refute the presumption.

Until an elector personally swears (or affirms) that he is over twenty-one years of age and has been a resident of his voting district for the requisite period of time, there is a *presumption* (not an inference) that he is not a qualified voter even though the elections officials know the contrary to be the fact. No amount of evidence other than the elector's personal oath (or affirmation) will suffice as a substitute for the personal oath or affirmation of the elector.

Until a litigant personally answers relevant interrogatories there is a *presumption* that his claim or defense is false no matter how much evidence (other than his direct answers to the interrogatories) he offers to produce to prove that his charges or denials of charges are true.

Until an applicant for a marriage license personally swears (or affirms) that he is unmarried, there is a presumption that his contemplated marriage will be bigamous even though there is abundant proof that he is free to marry and no proof to contradict such evidence.

The Argument briefly multiplies other instances, all of unquestioned constitutionality, in which *personal oaths* (or affirmations) of applicants for privileges are required, in the absence of which oaths there is a *presumption* that the applicant is disqualified even though he offers uncontradicted and overwhelming evidence other than his oath of his right to the privileges.

III.

Since petitioner has been refused a license to practice law only until he answers questions concerning his "*mem-*

bership in the Communist Party" and not on account of his refusal to disclose his "beliefs" or "views" as to the right of revolution or upon any other subject, it is certainly unnecessary and we think not appropriate that this court decide the question whether petitioner may constitutionally be required to answer questions as to his possible seditious or otherwise criminal "private belief" or "personal views" as distinguished from his possible overt acts, deeds and conduct constituting or evincing subversive memberships.

But if this question is to be answered at all, it should be answered: "Petitioner may constitutionally be required to disclose beliefs and views, as well as acts and deeds, to the extent that those beliefs and views are necessary ingredients of character and elements of fitness."

The Argument collects numerous examples of "beliefs" and "views" that, even though they are not punishable because they have not culminated in any criminal act, are nevertheless wholly inconsistent with "good character" or, even though morally irreproachable, are not consonant with "fitness". One of such areas of belief is as to the propriety of *present* revolution.

To the extent that petitioner's "beliefs" and "views" are relevant to the issue of character, he may constitutionally be required to divulge them.

IV.

The Argument demonstrates that since there is no case comparable to petitioner's matter in the annals of Illinois, there cannot possibly be any invidious discrimination against him or denial of equal protection.

Petitioner misconceives the impact of "equal protection" insofar as he suggests that Illinois' courts or committees

may not ask any applicant questions of the sort here involved unless it puts such questions to all such applicants.

Petitioner's published utterances on the right of revolution did not and could not constitutionally disqualify him from the practice of law. But they were of such tenor as permissibly prompt questions that are not invariably or even usually addressed to other candidates.

V.

Even though the record may *support* a finding that petitioner is of character and fitness to practice law, as three members of Illinois' Supreme Court and a substantial minority of that Court's Committee say that it does, the record does *not compel* such an inference.

Petitioner has been persistent in his refusal to comply with clearly constitutional requirements for admission to the bar.

Therefore the order now under review should not be set aside.

ARGUMENT.

I.

Petitioner should have known at the time of his first appearance before Illinois' Committee on Character and Fitness, was explicitly told by a unanimous Supreme Court of Illinois on September 23, 1954, and was again informed by that still unanimous court on September 17, 1957, that he would not be eligible under Illinois' law for admission to the State's bar until he answered questions concerning his possible membership in or contacts with subversive or other criminal organizations.

On January 14, 1957, when this court decided *Konigsberg* v. *State Bar of California*, 353 U. S. 252, California's requirement, if such requirement there was, that an applicant for admission to the bar of that State must answer questions concerning his possible connections with subversive groups was so unclear that a majority of this court could say (at p. 260):

> "There is nothing in the California statutes, the California decisions, or even in the Rules of the Bar Committee, which has been called to our attention, that suggests that failure to answer a Bar Examiner's inquiry is, *ipso facto*, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners. Serious questions of elemental fairness would be raised if the Committee had excluded Koingsberg simply because he failed to answer questions *without first explicitly warning him that he could be barred for this reason alone*, even though his moral character and loyalty were unimpeachable, *and then giving him a chance to comply*. In our opinion, there is nothing in the record

which indicates that the Committee, in a matter of such grave importance to Koingsberg, applied a *brand new exclusionary rule to his application—all without telling him that it was doing so.*" (Emphasis supplied.)

We confine this Point of our Argument very strictly to demonstrating that, however indefinite California's law may have been in 1957 with respect to any requirement that candidates for admission to her bar answer questions such as those involved in the *Konigsberg* case and in the instant case, **there has never been any uncertainty at any time since petitioner began the study of law that Illinois would not admit members of subversive organizations to her bar,** at least without denial of criminal *scienter* and without explanation of such membership if it existed.

It is virtually certain that petitioner knew before he ever sought admission to Illinois' bar that he would not be eligible for such admission until he answered questions concerning his possible membership in or affiliations with subversive or otherwise criminal groups. It is **absolutely** certain that he **actually knew** the peremptory tenor of this requirement not later than September 23, 1954, the date of the first opinion of the Supreme Court of Illinois in this matter, 3 Ill. 2d 464, and that he was **again** informed of this requirement, not by Illinois' Committee on Character and Fitness, but by a still unanimous State Supreme Court on September 17, 1957.

Under this Point we avoid any discussion of the Federal constitutionality of Illinois' requirement that petitioner answer questions concerning his possible membership in or affiliation with subversive or otherwise criminal organizations. We undertake to vindicate the Federal constitutionality of this requirement under Point II of this Argument, *post.*

Under this point we do no more than note briefly and in chronological order, first the unmistakably clear intimations, then the explicit declarations of Illinois' Supreme Court that candidates for admission to Illinois' bar will not be admitted to practice law in Illinois until they answer such questions or until this court holds that they need not answer them.

The first unmistakably plain utterance of Illinois' relevant requirements became accessible to the public in general and to petitioner in particular on June 11, 1945, when this court decided the case of

In re Summers, 325 U. S. 561.

Summers, who sought admission to the bar of Illinois, had "complied with all prerequisites for admission to the bar of Illinois except that he" had "not obtained the certificate of the Committee on Character and Fitness" required then and now by Illinois' law. (325 U. S. at p. 563.) The "sole ground for refusing to petitioner admission to practice was his profession of conscientious objection to military service". (p. 565.) Petitioner was "honest, moral, and intelligent", he having had "a college and a law school education". (p. 574.)

Summers challenged "the denial of admission from the viewpoint of a religionist." The court's opinion does not make clear but the record in the *Summers* case, available to petitioner in the library of the Chicago Bar Association and at the College of Law of the University of Chicago, reflects the fact that Summers was a member of the Methodist Church and that according to him, the tenets of that church permit although they do not require its members to hold the views of absolute pacifists.

But Article XII, Section 1 of Illinois' Constitution provided then as it still provides:

> "The militia of the state of Illinois shall consist of all able-bodied male persons resident in the state, between the ages of eighteen and forty-five, except such persons as now are, or hereafter may be, exempted by the laws of the United States or of this state." (Constitution of Illinois, Art. § 1, Ill. Rev. Stat. 1959.)
>
> "No person having conscientious scruples against bearing arms shall be compelled to do militia duty *in time of peace: Provided,* such person shall pay an equivalent for such exemption." (Constitution of Illinois, Art. XII, § 6, Ill. Rev. Stat. 1959.)" (Emphasis supplied.)

This court affirmed Illinois' rejection of Summers' application for admission to her bar in the following language (325 U. S. at p. 573):

> "• • • It is impossible for us to conclude that the insistence of Illinois that an officer who is charged with the administration of justice must take an oath to support the Constitution of Illinois and Illinois' interpretation of that oath to require a willingness to perform military service violates the principles of religious freedom which the Fourteenth Amendment secures against state action, when a like interpretation of a similar oath as to the Federal Constitution bars an alien from national citizenship."

Neither petitioner nor any other graduate of a law school that meets Illinois' requirements for legal education could rationally suppose that although Illinois bars those who will not take up arms in time of war *in defense* of the State and Nation, it would admit those whose affiliations would compel them to bear arms *against* Illinois and the United States, not only in times of war, but in times of peace.

The next definitive statement by the Supreme Court of Illinois that applicants for admission to the bar in general and petitioner in particular could not be eligible for admis-

sion to that bar until they should answer such questions as those involved in this case occurred on September 23, 1954, when the Supreme Court of Illinois announced its unanimous decision in

In Re Anastaplo, 3 Ill. 2d 471.

which opinion petitioner does not print as an Appendix either to his petition or to his brief. It is accordingly printed in full as Appendix I to this brief, *post*, p. 37.

From the opinion cited above, *In re Anastaplo*, 3 Ill. (2d) 471, Appendix I, *post*, the following facts appear:

Petitioner, "having successfully passed the Illinois Bar examination" (3 Ill. (2d) 471, at p. 472, App. I, p. 37, *post*), "was advised that he had failed to prove such qualifications as to his character and fitness as, in the opinion of the Committee, would justify his admission to the Bar of Illinois." The court said at page 480:

> "Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. **His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate.**" (Emphasis supplied.)

In that opinion, to the entirety of which this court will give attentive consideration, the Supreme Court of Illinois, assisted by briefs on behalf of petitioner and filed by the American Civil Liberties Union and of the National Lawyers Guild as *amici curiae*, reviewed the Committee's denial to petitioner of its Certificate of Fitness.

The court said at (3 Ill. 2d 482):

> "When an applicant, knowing of such condition [that is, conditions requiring petitioner to answer questions

such as those that have been involved in this case since its inception] applies for admission and signifies that he will take the oath of a lawyer, **we think it inconsistent with the privilege he seeks that he should be permitted to defeat pertinent inquiry into his ability to fulfill such conditions by any claim of the right of free speech.**" (Emphasis supplied.)

It was again made plain to petitioner on September 17, 1957, by a still unanimous Supreme Court of Illinois that so far as Illinois law was concerned, he was ineligible for admission to that state's bar until he answered questions concerning such associations. On January 14, 1957, this Court had announced its presently standing opinion in the *Konigsberg* case, 353 U. S. 252. Following that announcement petitioner again sought a Certificate of Character and Fitness from the Committee, which certificate was again refused. On September 25, 1957, he elicited the following order from a still unanimous Supreme Court (reprinted in full text *in re Anastaplo*, 18 Ill. (2d) 182, at p. 186):

"In 1951 the Committee on Character and Fitness for the First Appellate Court District denied the application of George Anastaplo for admission to the bar of Illinois. This Court affirmed the action of the Committee, (*In re Anastaplo*, 3 Ill. 2d 471,) and the Supreme Court of the United States denied *certiorari*. (348 U. S. 946.)

"Subsequently the applicant filed with the Committee a petition for rehearing on the basis of certain decisions of the Supreme Court of the United States. The Committee denied this petition.

"**The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of the government by force** in the light of *Konigsberg* v. *State Bar of California*, 353 U. S. 252, and *Yates* v. *United States*, 1 L. ed. 2d 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original ap-

plication was denied, and his present reputation. (Emphasis supplied.)

> "We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions."

Petitioner was thus plainly told again by a unanimous court that, in that court's own language, "the significance of the applicant's views as to the overthrow of government by force" required the hearing of "evidence".

We note for the sake of completeness but make no point of the fact, reflected in petitioner's Statement of the Case and in the opinion of which he now seeks review (18 Ill. (2d) 182, petitioner's App. I), that various members of the Committee on Character and Fitness indicated to petitioner that his refusal to answer the Committee's questions would affect his application; for in Illinois, the members of a Bar Association, sitting as Commissioners of the Supreme Court of Illinois, have even less judicial or *quasi* judicial power than have the judges of lower courts or administrative commissions and hearing officers. In Illinois, the recommendations of Commissioners in matters affecting admission to the Bar relating to discipline or concerning disbarment of attorneys, whether as to matters of law or of fact, are only advisory. There is no rule that these recommendations will not be disturbed if they are supported by substantial evidence. The Supreme Court of Illinois makes its own determinations of matters of fact. We make clear the extremely limited *quasi* judicial functions of such Commissioners in the margin.[1]

---

[1] The brief of the American Civil Liberties Union, *amicus curiae* in the instant case, suggesting and arguing a question not raised by petitioner, says that this court "fell into error" in the *Summers* case, 325 U. S. 561, by assuming in its opinion in that case that all of the sovereign powers of Illinois are vested in the Supreme Court of Illinois.

The opinion now before this Court, In re Anastaplo, 18 Ill. 2d 182.

In the opinion that is now before this Court for review, 18 Ill. (2d) 182, the Court, quoting with approval from its language in 3 Ill. (2d) at 481, said that petitioner's " **'refusal to answer** [questions as to petitioner's membership in the Communist Party] **has prevented the Committee from inquiring fully into his general fitness and good citizenship and justifies the refusal to issue a certificate.'** We reaffirm our adherence to the foregoing views."

It is clear Illinois will not inscribe petitioner's name on her roll of attorneys until petitioner makes *direct* answers *on his personal oath* to "questions as to membership in the Communist Party or known subversive 'front' organizations". No amount of evidence as to petitioner's character and fitness from sources other than petitioner and no

---

This court fell into no error in making this assumption, which is correct.

The general doctrine of tripartite "separation of power" does not apply in Illinois to the matter of admission to or suspension or expulsion from the State's bar.

The Supreme Court of Illinois exercises *all* of the sovereign faculties of Illinois with respect to the rolls of her bar and this is true whether the relevant power is ordinarily denominated "legislative", "executive" or "judicial". It promulgates (actually enacts) the rules governing admission to the bar and hence legislates, its clerk, bar examiners and commissioners perform all administrative functions in connection with admissions and the court makes its own adjudications as to all matters of admission and disbarment. There is no doubt about this. See *In re Day*, 181 Ill. 73.

The general rule that the findings of a lower tribunal will not be disturbed if they are supported by substantial evidence *does not apply to matters affecting the right to practice law.* See *In re McCallum, opinion on rehearing*, 391 Ill. 417, *affirmed* on direct appeal challenging the Rules of the Supreme Court of Illinois prescribing the latitude of the powers of commissioners, 326 U. S. 689 (*per curiam*).

And see *In re Heirich*, 10 Ill. 2d 357, 140 N. E. 2d 825, for an exposition, example and exercise of the court's plenary power to review *de novo* the actions of its Commissioners in a disbarment matter.

amount of testimony from petitioner himself as to his conduct and character take the place of petitioner's *direct* and *personal answers*, under oath or affirmation, to questions put to him as to the existence or lack of existence of subversive memberships and affiliations or beliefs in the past. This is true although the amount of evidence of petitioner's good character *aluinde* and in lieu of such direct answers may be overwhelming and wholly uncontradicted.

II.

Illinois does not deny petitioner due process of law by refusing to admit him to her bar until he answers questions concerning his possible membership in subversive or otherwise criminal organizations.

We confine this Point of our Argument strictly to a demonstration that petitioner's refusal to answer questions as to his possible *membership in or affiliation with* subversive or otherwise criminal organizations is not only reasonable but is in accordance with even the most latitudinarian norms of constitutional freedom that have found utterance in any of this Court's relevant opinions. We defer until Point III of this Argument, *post*, any questions of the Constitutional propriety of inquiring into petitioner's "beliefs" or "views" of a political or any other character insofar as "beliefs" or "views" are distinguished from "memberships" and "affiliations".

To make perfectly clear the carefully limited scope of this Point, we observe that *membership in* or *affiliation with* any organization of any character necessarily involves overt and objective *spoken or written words, acts or conduct.* Membership in or affiliation with any organization can never consist in a purely private and wholly undisclosed state of mind. To become a member of any organization, one must communicate in some fashion with someone.

Hence, although membership in any organization may indeed be secret, that is, clandestine, surreptitious or furtive, it can never be "private", that is wholly undisclosed to anyone. Therefore none of the considerations that we develop under this Point directly relate to any privately held "beliefs" or "views" of petitioner. They relate solely to his possible written, oral or otherwise objective and overt *acts* and *conduct* constituting or evincing possible membership in subversive societies.

Having thus delimited the scope of this Point, we divide it into Sub-Points:

First, the matter of petitioner's possible membership in or affiliation with subversive or otherwise criminal groups was a relevant and therefore constitutionally permissible subject to the Committee's inquiry.

Second, the requirement that petitioner directly answer, in his own words and under oath on affirmation, questions as to such possible membership or affiliation as a prerequisite to admission to the Bar is reasonable and therefore constitutional. We make it plain our contention that due process does not require Illinois to accept any amount of evidence, whether from petitioner or any other person or source, as equivalent to direct and unequivocal answers to the questions to petitioner concerning his possible membership in or affiliation with subversive or otherwise criminal organizations.

A.

Membership in or affiliation with a subversive or otherwise criminal organization, if such membership or affiliation exists, affords a constitutional ground for excluding petitioner from admission to the Bar of Illinois unless that membership or affiliation is explained.

Under this Sub-Point we do not discuss the right of Illinois' Committee on Character and Fitness or her Supreme

Court to require petitioner to answer any questions at all, provided, of course, that if he answers any questions, he is given an opportunity to explain any answers that he may make. Under this Sub-Point we argue merely that unexplained membership in or affiliation with a subversive or otherwise criminal organization is a constitutionally permissible ground for excluding petitioner from membership in the bar of Illinois.

We do this although we do not understand petitioner to debate the point; for this court is not bound by the concessions of the litigants as to matters of law. The briefs of *amici curiae* do seem to argue that even active membership in an organization having an ultimate if not a "clear and present" seditious purpose should not disqualify an applicant for admission to the Bar.

It should and we think that it does suffice to cite to this point this court's decision in *Dennis* v. *United States,* 341 U. S. 495, which holds that membership in the Communist Party with *scienter* of that organization's presently seditious and ultimately treasonable objective is ground for indictment, conviction and imprisonment by the Federal government as a felony against the United States.

But petitioner not only refused to answer questions concerning his membership in the Communist Party. He also refused to answer questions as to his membership in the Silver Shirts and the Ku Klux Klan.

Although the Communist Party does not at the present time profess any policy of racial discrimination, the same cannot be said of the Silver Shirts, a fascist, anti-semitic and anti-Negro organization, or the Ku Klux Klan, an anti-Negro, anti-semitic and anti-catholic political sect.

Illinois punishes the libel of a race under a statute (Ill. Rev. Stats., 1959, Ch. 32, par. 47) that this Court sustains

as constitutional. *Beauharnais* v. *Illinois*, 342 U. S. 809, *affirming People* v. *Beauharnais* v. *Illinois*, 408 Ill. 512.

Moreover, Illinois punishes with death not only those present at and actively participating in a murder committed in a rebellion against an Illinois police force or other constabulary but likewise punishes with death members of an organization who with *scienter* espouse a cause having for its object anarchy or other rebellion and eventuating in such murders. This is true with respect to members of the organization who have no part in, knowledge of or intent as to the actual affray resulting in homicide so long as they knowingly further the band's general objective of criminal violence. *People* v. *Spies*, 122 Ill. 1, *affirmed, Spies* v. *Illinois*, 123 U. S. 131.

The *Spies* case is better known as the *Haymarket riot* case. The execution of some of the defendants in that case has been criticized and Governor Altgeld's act in pardoning other defendants has been justified by many students of the case and its historical perspective. In the views of many historians of the riot, some of the defendants were not guilty of any knowing complicity in the group's objectives and, according to many other students of the case, none of the defendants received a fair trial.

But we are aware of no responsible dissidence, judicial, academic or of any other sort, from the major premise of the decision, that is, that those who knowingly form a band having murder for its object are guilty of murder if murder results from their confederation whether or not they are present at the homicide and even though they do not help to plot the actual slaying that occurs.

Since membership in the Communist Party is a felony against the United States and the fostering of group libels is a misdemeanor under a constitutionally valid enactment

of Illinois, it is clear that membership in the Communist Party, the Silver Shirts, or the Ku Klux Klan utterly disqualified any applicant from membership in the Illinois Bar unless perchance he could convince the Committee that he was an accredited agent of the Department of Justice or some law enforcing agency in Illinois, was writing a thesis on or other exposure of seditious groups or was virgin of knowledge of the band's criminal purpose.

B.

Illinois' requirement that petitioner directly answer questions concerning his membership in subversive or otherwise criminal organizations is reasonable and constitutional. Due process does not require Illinois to accept any quantum of evidence, no matter how overwhelming, of petitioner's character and fitness as a substitute for personal and direct answers to such questions on petitioner's oath or affirmation.

This court has sustained the dismissal of public servants from posts in State governments for refusal to answer questions concerning their membership in the Communist Paty.

This is true whether the refusal is based upon a claim of privilege against self-incrimination, *Lerner* v. *Casey*, 357 U. S. 468, or on a claim of a constitutional right of privacy or of silence. *Beilan* v. *Board of Education*, 357 U. S. 390.

The court has also rejected the claim of constitutional right of privacy or silence in respect to questions concerning possible subversive affiliations in inquiries conducted under Federal auspices in which a witness is entitled not only to the protecton of the due process clause of the Fifteenth Amendment but to the cloak of every other provision of the Bill of Rights. *Barenblatt* v. *United States*, 360 U. S. 109. *Uphaus* v. *Wyman*, 360 U. S. 72.

We understand petitioner to argue and *amici curiae* make clear their contention that a State has more power with respect to dismissal from public service, in which rights of tenure are of statutory origin, than it has with respect to the right to engage in the private practice of a learned profession, which, *once all constitutionally permissible requirements have been met*, is a right that is constitutionally protected. We concede at once that a state may impose *some* conditions upon tenure under Civil Service or even upon public employment without tenure that it could not enforce as a prerequisite to the right privately to practice law or medicine. For instance, a statute or an ordinance may forbid a Civil Service or other public employee to engage in certain types of political activity that it could not forbid the lawyers in private practice. The question is whether the requirement that an applicant for license to practice law answer questions concerning possible subversive memberships is such that it can be constitutionally enforced against incumbents of Civil Service or other public posts but cannot be imposed upon one who aspires to practice law.

The answer must be that the requirement *involved in this case* is one that is equally constitutional, whether it is addressed to public servants or to those who would become lawyers.

In the first place, Illinois certainly has a right to refuse a license to anyone who cannot meet the qualifications, at least as to character and fitness, for such a public office as assistant attorney general, assistant state's attorney or other lawyer's post in the state government. Under Illinois law, no state funds may be disbursed in payment of salary to any state employee who has not taken an oath of loyalty in accordance with the provisions of "An act in relation to the payment of salaries of state officers" (Ill. Rev. Stats.,

1959, C. 127, par. 166 (b), Vol. 2, p. 1914). The full text of that statute is as follows:

> "No employee of the State of Illinois, or any political subdivision, agency or instrumentality thereof, but excluding cities, villages, incorporated towns, townships and counties, shall receive compensation or expenses from any appropriation which has been heretofore made, or which shall hereafter be made until such person has on file with his or her employing authority the following affidavit signed under oath:
>
> United States of America }
> State of Illinois } ss.
>
> I, ..., do swear (or affirm) that I am not a member of nor affiliated with the communist party and that I am not knowingly a member of nor knowingly affiliated with any organization which advocates the overthrow or destruction of the Constitutional form of the government of the United States or of the State of Illinois, by force, violence or other unlawful means.
>
> (signed) .....,
> *Notary Public."*
>
> (Seal)

Petitioner does not challenge the constitutionality of the statute although if it is constitutional or so long as it is unchallenged, it disqualifies him from any post, including any lawyer's post, in the Government of Illinois.

This entire case can be disposed of by answering the question

> **"MAY ILLINOIS REFUSE TO LICENSE AS A LAWYER ONE WHO IS DISQUALIFIED BY LAW FROM HOLDING ANY LAWYER'S POSITIONS OR OTHER PUBLIC POST IN THE STATE GOVERNMENT?"**

Surely due process is not denied by requiring that anyone admitted to practice law in Illinois be qualified, at least as to character and fitness, for a lawyer's position in the public service!

Suppose, however, that we answer the question by responding

> "NO, EVEN THOUGH PETITIONER'S ADMISSION TO THE ILLINOIS BAR WILL NOT QUALIFY HIM FOR A LAWYER'S OR OTHER POSITION IN ILLINOIS STATE GOVERNMENT UNTIL HE TAKES ILLINOIS' OATH OF LOYALTY, IT IS STILL NECESSARY TO DETERMINE WHETHER DUE PROCESS GUARANTEES PETITIONER THE RIGHT TO A LICENSE THAT WILL ALLOW HIM TO ENGAGE IN PRIVATE PRACTICE SO LONG AS PETITIONER DOES NOT ACCEPT STATE EMPLOYMENT IN ILLINOIS."

Surely Illinois may require any applicant for admission to the bar to answer any question that New York may ask a subway conductor (*Lerner* v. *Casey*, 357 U. S. 468) or Pennsylvania may ask of a teacher in the public schools (*Beilan* v. *Board of Education*, 357 U. S. 399)!

Petitioner, the *amici curiae* and the Attorney General of Illinois all strongly emphasize the fact that no member of the Supreme Court of Illinois drew any inference from this record that Petitioner was, in fact, a member of any subversive or otherwise criminal organization.

But even though the record does not support an *inference* of petitioner's putative membership in an organization having treason for its object, it does justify an eminently constitutional *presumption* that petitioner is committed to such a band, which presumption need not yield to any amount of evidence, even though the evidence is overwhelming and uncontradicted, except petitioner's personal and direct answer to the questions involved under this Point.

The tenor of plaintiff's arguments and those of the *amici curiae* make it necessary to recall that *presumptions* have always been very different from and in one respect are quite the opposite of *inferences*.

A true *inference*, properly so called, is an actual *belief* engendered in the mind of a trier of questions of fact, *which belief arises from evidence*. But a true *presumption*, prop-

erly so called, has nothing to do with the actual belief of the trier of facts but directs decision either in the absence of any evidence or, even though there is abundant evidence, in the absence of a *particular kind of evidence* that constitutionally may be required and by law is required.

Let us exemplify and illustrate this most important point:

Suppose that a newspaper of national circulation should publish a statement charging that petitioner was a member of the Communist Party and was unfit to practice law in Illinois. Suppose that petitioner should sue this newspaper for libel. Suppose that the newspaper were to address a written interrogatory or orally propound on a deposition for discovery to petitioner the question "Are you or have you ever been a member of the Communist Party?"

Suppose that petitioner were to decline to answer this interrogatory "Yes" or "No" but were to offer to produce many character witnesses whose testimony would support an *inference* (*not* a presumption operative in the absence of evidence) that petitioner was not a Communist.

The proffer or even the production of such testimony would not suffice as a substitute for personal answer to the direct question.

Unless petitioner should answer this interrogatory specifically, in his own words and upon his own oath or affirmation, or unless he declined to answer it *on the specific ground that a truthful answer would tend to incriminate him*, any court would, at the very least, dismiss his complaint with prejudice for failure to answer directly, upon oath or affirmation and in terms of his personal knowledge a question that was not only relevant to but *of the very essence of* his case, that is, a question as to the truth or falsity of the allegedly defamatory publication, just as petitioner's possible membership in the Communist Party is *of the very essence* of his application for the right to practice law.

Presumptions, which, unlike true inferences, arise, not from an actual belief generated by a consideration of the evidence, but from a rule of law that is operative in the *absence* of the kind of evidence that may constitutionally be demanded and is by law required, *never* depend on the actual facts or on anyone's belief as to the facts of the particular case. Presumptions give effect to rules of law made for the ordinary governance of society. They are effective without regard to the actual merits of the particular case in which they are applied.

Although a court might "presume" petitioner to be a seditious character for the purposes of deciding a suit by petitioner for libel until petitioner should answer the direct question "Are you or have you ever been a Communist?", it would indulge precisely the opposite of that presumption were petitioner not a plaintiff in a libel case but a defendant in a case charging him with felonious membership in the Communist Party. In that case, petitioner would not have to take the stand at all nor would he even have to invoke the privilege of his incrimination. If no evidence was produced tending to show he was a Communist, he would be entitled to a directed verdict of "not guilty" even though the judge and jury believed or knew that he was plotting treason. He would be entitled to a "presumption" of innocence even though the judge and jury might gravely suspect him of guilt or know that he was guilty.

Similarly, when the automobiles of two drivers, Driver First and Driver Second, collide under such circumstances that the accident must have been the fault of one of them and each driver brings a suit against the other driver, if neither driver will answer any interrogatories as to how the accident occurred, in the case of Driver First the judge will "presume" that the accident was his fault and dismiss the suit brought by Driver First. But in the case brought by Driver Second, in which Driver Second has the burden of

proof, the same judge will "presume" that the accident was the fault of Driver Second and dismiss his suit.

This would be true in each case, even though an opposite judgment were reached in each case and even though each driver offered the testimony of many eye witnesses as to how the accident occurred so long as neither driver would personally answer, directly and categorically, under his personal oath or affirmation interrogatories directed to the issue on which he had the burden of proof.

The point is so important that we pursue it a little further.

Where a defendant is charged with bigamy, even though the defendant is shown to have successively married each of two women, there can be no finding of bigamy unless there is a further showing that his first wife was alive and that he was undivorced from her at the time that he went through a marriage ceremony with his second wife. The presumption of innocence of felony is stronger than is the usual presumption that a marriage, once shown to have been created and not shown to have been dissolved, still subsists.

But there is nothing unconstitutional about requiring an applicant for a marriage license to declare under his own personal oath either that he has never been previously married or, if he has been previously married, that his first spouse has died or there has been a divorce. Any state may refuse to issue such a license until the applicant gives his answers *on his personal oath or affirmation* to questions as to his marital status at the time he seeks a marriage license. It will not do for the applicant for such a license to refuse to answer the question personally but offer to bring a host of witnesses who will depose that he is not the sort of person who would be likely to commit bigamy.

Perhaps the most frequently enforced presumption, or, if one prefers the phrase, rule of substantive law expressed in

the form of a presumption, occurs in the case of the probate of wills. Nearly all states require that wills be "proved" by the testimony of two (or in some states three) subscribing witnesses or proof of the genuineness of their signatures. Until *this particular kind* of evidence is offered, there is a *"presumption"* that the signature is not genuine or, if genuine, that the testator was not of sound mind when he wrote it. Moreover, most states require proof that these subscribing witnesses shall have signed the will in the presence of the testator and that he shall have signed the instrument in the presence of each of them. No amount of evidence that the testator's signature is genuine, that he was of sound mind and free from undue influence will admit the will to probate if this requirement is not met.

It makes no difference whether in *petitioner's individual case*, a majority of the Committee and a majority of the members of Illinois' Supreme Court could find after months of very tedious attention to petitioner and his procession of witnesses, summoned from busy walks of life, that petitioner was of blameless character when a few words from petitioner, if truthful, would have disposed of this matter in 1951. Illinois' rule may be fashioned with a view to avoiding vast waste of time that can be saved by simple answers to direct questions. She need not impose upon her commissioner and highest court the need of compiling and reviewing a record of the dimensions of petitioner's transcript every time a candidate for the bar chooses not to answer simple and relevant questions.

III.

There is no basis for petitioner's assertion that he has been denied equal protection of the law.

Petitioner points to no case in the annals of Illinois in which any applicant other than petitioner himself has ever declined to answer *any* question *of any* kind for any reason.

and has nevertheless been admitted to the bar of Illinois. If the Attorney General of Illinois or those of his staff who are writing this brief knew of any such case, it would be their duty to inform this court of its existence. They know of no such case.

If petitioner means to suggest that the Committee on Character and Fitness must ask every applicant questions as to his possible memberships in and affiliations with subversive groups or may ask none of them any such questions, his argument seriously misconceives the Committee's functions and gravely misprises the import of equal protection.

Petitioner had admittedly written some prose that could not possibly disqualify him *ipso facto* from any right or privilege to which he was otherwise entitled but that did awaken a most natural inquiry as to what he meant by it.

He thereupon assumed the intransigent stance that he has maintained for nearly ten year and has refused to answer perfectly proper questions for that period of time.

He is neither to be debarred nor disbarred from the office of attorney because he has expressed constitutionally permissible beliefs in a style of rhetoric that is somewhat perfervid but quite obscure.*

The Committee need not have enough reason to exclude an applicant from the bar before it may ever venture a question that it does not invariably or even usually put to other candidates.

Petitioner has made no showing of any invidious discrimination either against any class of which he was a member or against him as an individual.

There is no basis for petitioner's claim that he has been denied equal protection of the law.

---

* Petitioner's essays are not seditious merely because they are dull and very poorly written. But because petitioner does not write well, his writings are unclear and thus evoke inquiry as to their meaning.

IV.

The court need not answer the question whether petitioner may constitutionally be asked questions about his private "beliefs" or "views" as distinguished from his acts and conducts. But if the question is to be answered at all, it should be answered that Illinois may ask such questions.

This court has said that belief is "in its nature absolute."

But all statements, certainly all juridical utterances, must be restrained by their contexts.

It is true that mere subjective beliefs, never manifested overtly, cannot constitutionally be punished.

But it is not quite true that "beliefs" and "views" are always and necessarily without legal consequences so long as they do not culminate in antisocial conduct.

We exemplify:

One who believes, whether from religious prepossessions or otherwise, that surgery should never be practiced is not only unqualified for a license as a surgeon. He may constitutionally be refused a license to practice medicine without surgery; for doctors of medicine must, according to accepted professional and legal standards that are perfectly constitutional, recommend operations under some circumstances even though they lack the skill or the will to perform them.

There is a sect of several hundred persons living in and largely governing a small town near Chicago called Zion, Illinois, whose faith impels them to believe that the earth, except for hills and declivities, is a flat disk and not an approximate but not quite perfect sphere, as most of us think that it is. No one suggests that these persons can be fined or imprisoned for their pertinacity in maintaining this

view. But none of them is qualified for a license as a maritime or aeronautical navigator, or, for that matter, to teach geography.

Citizenship is denied to those who *believe* in polygamy whether they practice it or not. And this court said in the *Summers* case that Illinois might bar Summers from the practice of law because a

> "like interpretation of a similar oath as to the Federal Constitution bars an alien from citizenship." (325 U. S. at p. 573.)

One who believes in treason, mass murder, genocide or other horrors that menace civilization is not the sort of person whom Illinois must admit to her bar even though he has not yet begun to put these beliefs into practice.

If, as we submit is true, Illinois may exclude petitioner from her bar if he holds arrantly dangerous or treasonable beliefs, she may certainly ask him whether in fact he holds these beliefs; for he and he alone really knows the answer to that question.

V.

The record does not compel the conclusion that petitioner is a fit person to practice law.

We are firm in our insistence that, once it is perceived that petitioner has certainly known since at least 1954 that Illinois required him to give direct answers under oath to questions as to his possible membership in subversive organizations so that no "brand new exclusionary rule" has been applied against him, the only question before this court is: "Is this requirement constitutionally applied to petitioner?"

If the rule is clearly constitutional, as we submit that it is (see Point II, *ante*), then no question as to petitioner's fitness to practice law in Illinois is before this court.

But petitioner and both *amici curiae* argue the question of petitioner's fitness for the bar as though that question were justiciable in this case and as though, if justiciable, it requires an affirmative answer.

Lest the Attorney's General failure to answer this question be deemed an acquiescence in petitioner's and the *amici's* contentions, he make the following brief observations.

A minority of the Commissioners and three members of the Supreme Court of Illinois found petitioner to be a proper person to practice law in Illinois.

A majority of the Commissioners and of the court did not so find.

The question of petitioner's fitness, if that question is presented at all, is this:

> EVEN THOUGH THE RECORD MAY *PERMIT* A FINDING OF PETITIONER'S FITNESS TO PRACTICE LAW, DOES THE EVIDENCE SO IMPERIOUSLY *COMPEL* SUCH A FINDING AS TO RENDER THE CONTRARY DECLARATION OF A MAJORITY OF ILLINOIS' SUPREME COURT A DENIAL OF DUE PROCESS?

The Attorney General of Illinois submits that the question stated above must be answered in the negative.

The purview of the office of the committee that recommended (it had no power authoritatively to find) that petitioner be deemed unfit for the practice of law is connoted if not, indeed, denoted, by its title, which is *not* "The Committee on Character" but "The Committee on Character *and Fitness.*"

Petitioner, apprised of Illinois' requirement that he answer questions of the sort involved in this case, knowing that Illinois bars those from the practice of law whose

scruples prevent them from bearing arms in her defense, did not content himself with a simple statement of his position but volunteered *ex gratia,* although no one asked him, that as a lawyer he could not advise a client to defy a judgment of an Illinois court by violence, but nevertheless, as a friend or private citizen he must give such advice. He did not delimit the circumstance that might impel or dispose him to advise violence as a justifiable means of avoiding the effect of the orders of courts of whom he hopes to be officers.

Petitioner does not even yet give a sensible reason why he will not answer the questions involved in this case. He does not say that the answers will incriminate him. He knows that answers to questions such as those involved in this case, as to actions if not as to belief, can be required of him by any grand jury, by any Federal, State or municipal legislative committee the scope of whose investigation renders the questions relevant and by any civil service board or State official with authority to appoint him to any post that he may seek.

He therefore knows that there is no constitutional mantle that invariably insulates him or any other citizen from these questions.

He knows that if he becomes a lawyer and if his interest in cases involving freedom of conscience should lead him to defend an allegedly subversive person, he would have a duty to ask *every prospective juror in the case* whether the *venireman* had ever been a member of the Communist Party, whether he believed in the overthrow of the government by violence and whether he had any religious scruples that would prevent him from serving as a juror or taking a juror's oath.

Furthermore he could insist on an answer to these questions or his client would be denied the rudiments of a trial by jury.

The Attorney General of Illinois submits that when a majority of that State's highest court refuse to make a lawyer of a man who will not answer the very kind of questions that it will be his duty to compel prospective jurors, witnesses and other persons to answer, that court's action does not deny due process of law.

Conclusion.

For the reasons set forth in this brief, it is submitted that the order of the Supreme Court of Illinois now under review should be affirmed if a plenary consideration of this case does not convince the court that *certiorari* was improvidently granted.

Once this court has granted *certiorari*, the Attorney General of Illinois does not ordinarily suggest that it reconsider its action. He addresses the case on the merits, as he addresses this case.

But ordinarily, the Attorney General has either answered the petition for *certiorari* or has had an opportunity to do so.

In this case, however, the Attorney General had no such opportunity; for petitioner did not observe the usual practice of serving any copy of his petition or notice of its filing upon the Attorney General although the Attorney General is the only counsel who represents or can represent Illinois in this court.

Petitioner did serve the Chicago Bar Association or its counsel with a copy of his petition. They did not transmit it to the Attorney General, presumably because they could not reasonably suppose that petitioner would not serve the State's only counsel in a case against the State. But the commissioners, like masters and referees, are advisors to the court, not adversary litigants or opposing advocates.

Petitioner must know that it is always the Attorney General, never the Chicago Bar Association, that represents Illinois in this court. *Cf. In re Summers*, 325 U. S. 561, in which it was the Attorney General of Illinois, not counsel for the Chicago Bar Association, who represented Illinois.

The late Grenville Beardsley, Attorney General of Illinois when this petition was filed, and the staff of his appeals division had no intelligence from any source that this petition had been filed until the day that it was granted and they received this court's telegram to that effect.

The court needs no protection from groundless petitions for *certiorari when the petitions fairly disclose the essence of the case sought to be presented* and *when respondents have an opportunity to respond to the petitions*. The instant petition, however, made no such disclosure, as must now appear, nor did the Attorney General of Illinois have an opportunity to answer it.

Therefore we suggest alternatively that this court affirm the order now before it or dissolve as improvided its action in granting its writ of certiorari.

Respectfully submitted,

WILLIAM L. GUILD,
Attorney General of the State of Illinois,
160 N. La Salle Street, Room 900,
Chicago 1, Illinois, (Tel.: FI 6-2000),
Counsel for Respondent.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
A. ZOLA GROVES,
Assistant Attorneys General,
Of Counsel.

APPENDIX I.

In Re Anastaplo, 3 Ill. 2d 471.

Mr. JUSTICE DAILY delivered the opinion of the court:

"George Anastaplo, to whom we shall refer as petitioner, having successfully passed the Illinois bar examination, filed with the Committee on Character and Fitness for the First Appellate Court District, an application for admission to practice before the courts of this State, together with affidavits as to his good moral character and general fitness to practice law, as required by section IX of Rule 58 of this court. (Ill. Rev. Stat. 1951, chap. 110, par. 259.58.) Subsequently, and as further ordained by the rule, he appeared before a two-man section of the committee and before the entire committee for the purpose of furnishing evidence of his moral character and good citizenship. Ultimately, on June 5, 1951, petitioner was advised that he had failed to prove such qualifications as to character and general fitness as, in the opinion of the committee, would justify his admission to the bar of Illinois. Petitioner did not seek a rehearing, as was his right, and while the committee has continued to refuse to issue him a certificate of character, it has held itself open to further suggestions and arguments of petitioner, presented through the media of letters and one further appearance of petitioner before the committee.

Petitioner has now filed in this court what is termed a 'Petition and appeal from the refusal of the Committee on Character and Fitness * * * to sign a favorable certificate for admission to the practice of law for the Applicant and Motion to the Supreme Court of Illinois to provide for the admission of the Applicant to the practice of law in the state of Illinois.' Although we have held that the discretion exercised by the committee on character and fitness will not ordinarily be reviewed, (*In re Frank*, 293 Ill. 263), and it is well established that a petition for admission to the bar, though a judicial function, is an administrative act rather than

a judicial proceeding, (*In re Summers*, 325 U. S. 561, 89 L. ed. 1795,) it is our opinion, in the light of petitioner's claims that the committee abused its discretion and that certain of his constitutional rights were infringed upon, there exist circumstances which should cause us to set the matter down for argument and opinion. (*In re Summers*, 325 U. S. 561, 89 L. ed. 1795; *Brooks* v. *Laws*, 208 Fed. 2d 18.) Accordingly, petitioner has filed a brief and argument, we have granted leave to the American Civil Liberties Union and to the National Lawyers Guild, as *amici curiae*, to file briefs in petitioner's behalf and have permitted Stephen Love, a Chicago attorney and one-time committee member who apparently did not concur in its action, to file his suggestion in the cause.

Looking to the record, to the committee report to this court, and to petitioner's brief, we find that the crux of the controversy is centered upon petitioner's refusal to answer as to whether he was a member of the Communist Party or of any of the subversive organizations on the list compiled by the United States Department of Justice. When first asked if he was a member of the Communist Party petitioner responded that the question was an inquiry into his political beliefs and an "illegitimate question." Similar responses to similar questions appear in other portions of the record of petitioner's examination and at no time did he answer the question. Predicated upon these refusals, the committee, on the basis of their opinion that a member of the Communist Party, because of such membership, might not be able in good faith to take the oath of lawyer to support the constitution of the United States and the constitution of the State of Illinois, then directed questions to petitioner designed to elicit his views in what the committee felt were pertinent areas of inquiry. Briefly summarized, as the result of the committee's questioning, petitioner expressed his opinion that a member of the Communist Party, otherwise qualified, should be admitted to the practice of law and that he could see nothing contradictory or incompatible between adherence to the tenets of that party and the taking of the oath to support the constitutions. Likewise, at this time, he expressed his belief in the doctrine

of revolution and the overthrow of government by force of arms, saying that he would embrace such doctrine if he could not agree with the existing government, or found it unsatisfactory, and felt that force of arms was the only means to attain the end desired. He stated that such view would not be altered even though the existing government provided for peaceful and orderly means of change. In its report, the committee states that the views and opinions expressed by petitioner on these matters were not the basis for the denial of a certificate, but that the committee agreed such views increased the importance of petitioner's refusals to answer and made more necessary a complete answer on the subject of membership in the Communist Party, so that the committee could better determine the ability of petitioner to take the oath of attorney in good conscience and his good citizenship.

Petitioner presently contends that the committee abused its discretion and exceeded its function by inquiring into his political views, directly and indirectly, and charges that its action in denying him a certificate stems from hostility and differences of personal opinion rather than from considerations of his lack of moral character or general fitness to practice law. At the outset of our consideration of this point, we wish to say that we find nothing in the record to substantiate petitioner's conclusion that the committee was hostile to him or that its decision was motivated by personal opinions differing from his own. What does appear clearly is that the denial was based upon the doubts as to his ability to take the oath of lawyer in good conscience created by his refusal to answer whether he was a member of the Communist Party or other known subversive "front" organizations for that party. Thus our first consideration must be directed to whether petitioner's membership or nonmembership in the party was a relevant field of inquiry or whether the committee abused its discretion and exceeded its function.

In this jurisdiction it is firmly established that the power to regulate and define the practice of law is a prerogative of the judicial department, as one of the three divisions of the government created by article III

of our constitution, an inherent adjunct of which is to prescribe regulations for the study of law and the admission of applicants for the practice of the profession. (*In re Day*, 181 Ill. 73; *People ex rel. Illinois Bar Assn.* v. *Peoples Stock Yards State Bank*, 344 Ill. 462; *People ex rel. Chicago Bar Assn.* v. *Goodman*. 366 Ill. 346.) A concomitant principle, established by the decisions of this court, is that the right to practice law is a privilege, and a license for that purpose makes the holder an officer of the court, and confers upon him the right to appear for litigants, to argue cases and collect fees therefor, and creates certain exemptions, such as from jury service and arrest on civil process while attending court. (*In re Day*, 181 Ill. 73, 80.) In the exercise of its judicial power over the bar, and in discharge of its responsibility for the choice of personnel who will compose that bar, this court has adopted Rule 58, (Ill. Rev. Stat. 1951, chap. 110, par. 259.58,) which governs admissions and provides, among other things, that applicants shall be admitted to the practice of law by this court after satisfactory examination by the Board of Examiners and certification of approval by a Committee on Character and Fitness. Section IX of the rule provides for the creation of such committees and imposes upon them the duty to examine applicants who appear before them for moral character, general fitness to practice law and good citizenship. Still another condition precedent to admission to practice law in this State, imposed by the legislature, is the taking of an oath to support the constitution of the United States and the constitution of the State of Illinois. (Ill. Rev. Stat. 1951, chap. 13, par. 4.) We think the conclusion inescapable that the inquiry of the committee must be directed, in part, to the ability of an applicant to take the required oath in good conscience. Such an oath requires loyalty to our government, as does any concept of good citizenship, thus inquiry aimed at determining the loyalty of an applicant, must be deemed to be relevant to a determination of the conditions for admittance fixed both by the statute and by the rule of this court.

In the case of *Dennis* v. *United States*, 341 U. S. 494, 95 L. ed. 1137, wherein the provisions of the Smith Act directed at conspiracy to teach or advocate the over-

throw of the government by violence were held to be valid, we find an authoritative characterization of the Communist conspiracy and the purposes of the Communist Party in these terms: 'Their conspiracy to organize the Communist Party to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence.' (341 U. S. 494, at 516-517, 95 L. ed. 1137, at 1156.) Prior to that case, in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 94 L. ed. 925, where the supreme bench upheld the constitutionality of the non-Communist affidavit provision of the Labor Management Act, we find it stated by Mr. Justice Jackson concurring in part and dissenting in part, that 'the Communist Party is something different in fact from any other substantial party we have known, and hence may constitutionally be treated as something different in law.' He summarizes these differences, in part, as follows: '1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate. • • • 2. The Communist Party alone among American parties past or present is dominated and controlled by a foreign government. • • • 3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal. • • • 5. Every member of the Communist Party is an agent to execute the Communist program." The Justice states that from such data 'Congress could rationally conclude that, behind its political facade, the Communist Party is a conspiratorical and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system.' (339 U. S. 382, at 424, 94 L. ed. 925, at 957.) And we observe that such a conclusion has been explicitly expressed by Congress in the recently enacted 'Communist Control Act of 1954.' In the preamble of such act, it is stated that 'The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact and instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes

an authoritarian dictatorship within a republic, demanding for itself rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution.' Similarly, courts of our sister States have recognized and agreed that the Communist Party is subversive and constitutes a continuing conspiracy against our government. (*Board of Education* v. *Wilkinson*, 125 Cal. App. 2d 127, 270 Pac. 2d 82; *Daniman* v. *Board of Education*, 306 N. Y. 532, 119 N. E. 2d 373; *Faxon* v. *School Committee of Boston*, (Mass.) 120 N. E. 2d 772.) In still another instance a Canadian court has stated categorically that a person subscribing to the Marxist philosophy is not a proper person to practice law. In *Martin* v. *Law Society of British Columbia*, 3 Dominion Law Reports 173 (1950) it is said: 'The Marxist philosophy of law and government in its essence is so inimical in theory and practice to our constitutional system and free society that a person professing them is *io ipso* not a fit and proper person to practice law.' Quite apart from these manifestations by the judiciary, we also think, to borrow a phrase from the *Faxon* case, it is a matter of common knowledge that 'multitudes of people * * * regard with abhorrence the Communist Party and communism as that term is generally understood.' This thought of our people is becoming more and more evident and is reflected in the increasing efforts of their elected representatives to legislate both against the growth and the very existence of the Communist Party in our land.

Neither the committee nor this court, faced with the question of whether membership in the Communist Party is relevant to a determination of petitioner's good citizenship and his ability to take the oath of lawyer in good conscience, need be oblivious to the existence of that party and its established conspiratorial nature, nor the view in which it is held by the people of this country. Aside from the fact that membership in an organization advocating the forceful overthrow of our government would give rise to questions concerning the sincerity of an applicant's oath of loyalty, it is proper to consider that the lawyer, as an officer of the court, holds a position of public trust, or at least of

semipublic trust. As is stated in *In re Both*, 376 Ill. 177, 182: 'Attorneys at law admitted to the bar of this State are officers of this court. * * * The relation of the court and its attorneys to the people is one of high responsibility, involving on the one hand complete trust and confidence and on the other absolute fidelity and integrity.' Because of his training and the trust and confidence reposed in him, the lawyer is presented with extensive opportunity to impress his attitudes and views on the public and to effect the translation of those views into legislative action, for the legal profession, more than others, is looked to for political leadership and is expected to institute and guide legislative change. There also comes from the profession the judiciary which interprets the laws and, undoubtedly to a greater degree than from other professions, the legislators who enact and draft our laws and the men and women who administer them.' Considering these functions of the lawyer, along with his position of being an officer of this court in whom public trust and confidence is reposed, this court, or its committees, would be derelict in their responsibility to the public, if knowing of the Communist Party and its insidious aims, we stood mutely by and made no effort to thwart, or inquire into, its infiltration into the bar of this State. As one court has put it: "In the life-and-death struggle into which our people have been plunged by the monstrous conspiracy called communism, it is becoming more and more apparent that it is essential for the continuance of our national life that we know who is for us and who is against us. This is no time to allow any person who would destroy us, our liberties, our religious convictions, and our government to be employed in any branch of that government, * * *." (*Board of Education* v. *Wilkinson*, 125 Cal. App. 2d 127, 270, Pac. 2d 82, 86.) While technically not a governmental employee, a lawyer meets on common ground with one so employed, in that loyalty to the constitution is an inalienable condition to their service. In either case, Communist Party membership or communist activity is totally incompatible with such loyalty.

It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive "front" organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate.

We are next met, however, by petitioner's contention that inquiries about his 'political affiliations and organizational memberships' are unconstitutional, as being in derogation of the right to free speech guaranteed under the first and fourteenth amendments to the constitution of the United States. Though petitioner argues forcefully and at great length, it is our impression and interpretation that *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 94 L. ed. 925, and *Dennis* v. *United States*, 341 U. S. 494, 95 L. ed. 1137, authoritatively establish that such an inquiry, under the circumstances presented, does not violate the constitutional mandate relied upon. The rationale of both cases is that belief in the overthrow of the government by force, in the face of the reality that beliefs are the springs to action, is a substantial enough interest to limit speech. They both say, that while one may be permitted to advocate and believe what he will, there is a clear and present danger in the Communist conspiracy from which a public evil will result, and from which the public has a right to be protected even though the constitutional right of free speech of some per-

sons or groups are in some manner infringed. If this were not enough to refute the petitioner's claim, it is also stated in the *Douds case* (339 U. S. 382, 398, 94 L. ed. 925, 943-944,) that government's 'interest in the character of members of the bar, *Re Summers*, 325 U. S. 561, 89 L. ed. 1795, 65 S. Ct. 1307 (1945), sometimes admit of limitations upon rights set out in the First Amendment.'

In the *Summers case* an applicant for admission to the bar of this State was denied admittance, though otherwise qualified, on the sole ground that he had conscientious scruples against war and would not use force to prevent wrong under any circumstances. The Supreme Court of the United States upheld our refusal and expressly held that our action did not violate the first amendment, as its demands are incorporated in the due-process clause of the fourteenth amendment. In analyzing the *Summers* decision during the course of the *Douds* opinion, the court said: 'Again, the relation between the obligations of membership in the bar and service required by the state in time of war, the limited effect of the state's holding upon speech and assembly, and the strong interest which every state court has in the persons who become officers of the court were thought sufficient to justify the state action.' (339 U. S. 382, 405, 94 L. ed. 925, 947.) We see no substantial difference, or basis for a different application of the limitations on the right of free speech, between an inquiry into Summers' belief that he would not bear arms in support of his government and in inquiry, where the existence of a clear and present danger is known, directed to petitioner's membership in an organization which advocates the overthrow of the same government, by force of arms if necessary. Measured by popular belief and opinion, we think that one who would embrace a movement to overthrow our government by force of arms is relatively more unqualified to fulfill his obligations as a lawyer than is a person who, because of conscientious scruples, would not use force of arms to prevent wrong. The latter admits of some loyalty to his government, the former, none.

Further, in regard to the contention that petitioner's right of free speech has been infringed upon by the

inquiries of the committee, we may also consider the established principle of this jurisdiction that the practice of law, is a privilege, not a right. In granting that privilege we may impose any reasonable conditions within our control and if an applicant does not choose to abide by such conditions he is free to retain his beliefs and go elsewhere. Among other things, the granting of the privilege to practice law in this State is conditioned upon proof by the applicant of his good moral character, of his general fitness to practice law and of his good citizenship, and upon the taking of an oath to support the State and Federal constitutions. Such conditions are almost universal in this land and, so far as we can ascertain, their reasonableness has never been attacked. When an applicant, knowing of such conditions, applies for admission and signifies that he will take the oath of lawyer, we think it inconsistent with the privilege he seeks that he should be permitted to defeat pertinent inquiry into his ability to fulfill such conditions by any claim of the right of free speech. This has been the principle applied in the field of public employment to sustain a finding that such employees agree to suspend their constitutional rights of free speech by the implied terms of their employment, (See: *McAuliffe* v. *City of New Bedford*, 155 Mass. 216, 29 N. E. 517; *Drury* v. *Hurley*, 339 Ill. App. 33, 88, N. E. 2d 728; *Joyce* v. *Board of Education*, 325 Ill. App. 543, 60 N. E. 2d 431; *Faxon* v. *School Committee of Boston*, (Mass.) 120 N. E. 2d 772; *Daniman* v. *Board of Education*, 306 N. Y. 532, 119 N. E. 2d 373,) and we think it has equal application here. In seeking the privilege of admission before this court, petitioner must be deemed to have agreed to waive his constitutional right of free speech against relevant inquiry.

We conclude that the committee's inquiry into petitioner's membership in the Communist Party was relevant to a determination of his good citizenship and his ability to take the oath of lawyer in good conscience, and that petitioner's constitutional rights were not infringed upon by such action. On the present record the petition must be denied.

Petition denied."

Certificate of Service.

WILLIAM C. WINES, a member of the Bar of this Court, hereby certifies that he has served five copies of the foregoing Brief of Respondent by mailing same, first class postage prepaid to Petitioner, George Anastaplo, 6030 Ellis Avenue, Chicago 37, Illinois, and three copies to each of the following:

American Civil Liberties Union,
c/o Harry Kalven, Jr.,
Roscoe T. Steffen,
19 South La Salle,
Chicago 3, Illinois.

Ben Margolis,
3175 West 6th St.,
Los Angeles, California.

Frank B. Belcher,
510 South Spring Street,
Los Angeles 13, California.

National Lawyers Guild,
c/o David Scribner,
154 Nassau Street, New York, N. Y.

Leonard B. Boudin,
25 Road Street, New York 4, N. Y.

William B. Murrish,
6331 Hollywood Boulevard,
Hollywood 28, California.

Theodore Kindl,
15 Broad Street, New York 5, N. Y.,
Counsel for Petitioner in Cause No. 84, Cohen v. Hurley.

Dennis M. Hurley,
Burrough Hall,
Brooklyn 1, New York, N. Y.

Illinois was not served with a copy of Petitioner's Brief in No. 28, *Konigsberg* v. *State Bar of California*, and has no address of record for petitioner in that case or his counsel.

FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 7. 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 58

IN RE GEORGE ANASTAPLO,

Petitioner.

Reply Brief

GEORGE ANASTAPLO,
6030 Ellis Avenue
Chicago 37, Illinois
DOrchester 3-4825
Counsel pro se

Carterville, Illinois

November 24, 1960

INDEX.

PAGE

I. On the Service of the Petition for a Writ of Certiorari 1

II. The Attorney General's Argument on the Merits: Comments and Corrections 12

1. On the relation between the Declaration of Independence and the inquiries into possible political affiliations 12

2. On what petitioner, the Attorney General and the character committee "should have known" .. 17

3. On the Attorney General's "presumption" theory 24

4. On the relation between a *voir dire* and a bar admission proceeding 28

5. On the Communist Party, the Ku Klux Klan and the horrors that menace civilization 32

6. On the use and abuse of the record 33

7. On due process and the overwhelming proof of good character 36

Conclusion 39

TABLE OF AUTHORITIES CITED*

Constitutional Documents

Amendment I, Const. 31

Amendment XIV, Const. 31

Article V, Section 25, Ill. Const. 18

Article II, Section 1, 2, 4, Ill. Const. 18

Article XII, Section 1, 6, Ill. Const. 18

Declaration of Independence 16, 17, 39

* Various law review and other publications are referred to below in Notes 11, 14, 17, 18, 23, 34, 45, 54, 61, 63 and 67.

CASES

	PAGE
Adler v. Board of Education, 342 U.S. 485	31
Anastaplo, In re, 3 Ill. 2d 471, 121 N.E. 2d 826	6, 19
Beilan v. Board of Education, 357 U.S. 399	31
Brown v. Board of Education, 347 U.S. 483	17
Central Military Track R. R. v. Rockafellow, 17 Ill. 541	19, 28
Dennis v. United States, 341 U.S. 494	28
Garland, Ex Parte, 4 Wall. 333	31, 36, 39
Girouard v. United States, 328 U.S. 61	19
Heirich, In re, 10 Ill. 2d 357	24
Holland, In re, 377 Ill. 346, 36 N.E. 2d 543	18, 38
Kimm v. Rosenberg, 363 U.S. 405	26
Konigsberg v. State Bar, 353 U.S. 252	18, 19, 24, 31, 36
Konigsberg v. State Bar, 344 P. 2d 777	27
Lerner v. Casey, 357 U.S. 468	31
Schware v. Board of Bar Examiners, 353 U.S. 232	19, 31
Service v. Dulles, 354 U.S. 363	37
Sheiner v. State, 82 So. 2d 657 (Fla.)	38
Summers, In re, 325 U.S. 561	2, 18
Syrek v. California Unemployment Insurance Appeals Board, 354 P. 2d 625	36
United States v. Dennis, 183 F. 2d 201	29
United States v. Macintosh, 283 U.S. 605	19
United States v. Schwimmer, 279 U.S. 644	19
Wasy v. State, 234 Ind. 52, 123 N.E. 2d 462	30
West Virginia Board of Education v. Barnette, 319 U.S. 624	36
Wieman v. Updegraff, 344 U.S. 183	31

STATUTES

	PAGE
Ill. Rev. Stat. 1959, Ch. 3	25
Ill. Rev. Stat. 1959, Ch. 38, Ch. 89	25
Ill. Rev. Stat. 1957, Ch. 46	25
Ill. Rev. Stat. 1959, Ch. 127	30

SUGGESTED CORRECTIONS OF THE CERTIFIED RECORD.

(1) The record at R. 151 should be corrected to show petitioner saying (in conformity with his evident intention as well as with R. 216),

> . . . even with respect to this committee, I would say there may be instances when an applicant should say, " It would be more harmful to the Illinois Bar if I did resist the committee by standing on principle than if I did not resist them. Therefore, I will waive my privileges." That is the sort of decision that one has to make throughout life.

(2) The record at R. 535 should be corrected to show Mr. Justice Bristow saying (in conformity with his dissenting opinion, as printed in 163 N.E. 2d 429, at 444, and in Appendix, Pet. Writ Cert., 64, 53n),

> I also fail to perceive the necessity for the delay of an entire year between the conclusion of the hearings and the decision of the committee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 58

IN RE GEORGE ANASTAPLO,
Petitioner.

Reply Brief

Petitioner, George Anastaplo, who seeks correction of the denial of his application for admission to the practice of law in the State of Illinois, respectfully submits this Reply Brief.

I. On the Service of the Petition for a Writ of Certiorari.[1]

The Attorney General of Illinois has closed his Brief for Respondent with remarks about petitioner's service in March 1960 of his Petition for a Writ of Certiorari (Att'y

[1] Petitioner's answer to the Attorney General's arguments on the merits begins at page 12 of this Brief. As in the Brief on the Merits, the footnotes—which are, for the most part, useful elaborations of points made in the text—may be disregarded by the busy reader. See Note 15, this Brief.

Gen'l, 35-36). Since these remarks reflect adversely on petitioner's competence, if not upon his good faith toward an adverse party and toward this Court, petitioner is obliged (even at the risk of seeming to protest too much) to set down a full account of the transaction. He recognizes, that is, the obligation of one in his position to address himself with candor to real "character and fitness" issues, especially when he seeks admission not only to the bar of his State but to that of this Court as well.

The Attorney General complains, in support of his request that the May 2, 1960 grant of certiorari be reconsidered, that he did not have the opportunity to answer the Petition for a Writ of Certiorari (Att'y Gen'l, 35-36),

> . . . for petitioner did not observe the usual practice of serving any copy of his petition or notice of its filing upon the Attorney General although the Attorney General is the only counsel who represents or can represent Illinois in this court.
>
> Petitioner did serve the Chicago Bar Association or its counsel with a copy of his petition. They did not transmit it to the Attorney General, presumably because they could not reasonably suppose that petitioner would not serve the State's only counsel in a case against the State. But the commissioners, like masters and referees, are advisors to the court, not adversary litigants or opposing advocates.
>
> Petitioner must know that it is always the Attorney General, never the Chicago Bar Association, that represents Illinois in this court. *Cf. In re Summers*, 325 U.S. 561, in which it was the Attorney General of Illinois, not counsel for the Chicago Bar Association, who represented Illinois.
>
> The late Grenville Beardsley, Attorney General of Illinois when this petition was filed, and the staff of his appeals division had no intelligence from any source

that this petition had been filed until the day that it was granted and they received this court's telegram to that effect.

> The court needs no protection from groundless petitions for certiorari when the petitions fairly disclose the essence of the case sought to be presented and when respondents have an opportunity to respond to the petitions. The instant petition, however, made no such disclosures, as must now appear, nor did the Attorney General of Illinois have an opportunity to answer it. [Italics omitted].

This passage demands the following corrections and comments.[2]

1. Petitioner, in his dealings with the Illinois bar authorities, has always had difficulty learning just whom to serve: the problem is not as simple of resolution as the Attorney General believes. It is for this reason that petitioner included in a letter of March 4, 1960, to the Clerk of the Supreme Court of Illinois—a letter which was sent also to the Secretary of the Committee on Character and Fitness and to the member of the court below in petitioner's judicial district—, the following request:[3]

> My present plans are to file my Petition for a Writ of Certiorari in the next week or so. I would appreciate learning from you whether the Court has authorized anyone to receive service for it in this matter.

---

[2] The Petition itself provides ample refutation of the charge that there was not fair disclosure of "the essence of the case sought to be presented." Therefore, only the charge relating to the service of the Petition is taken up in the pages that follow.

[3] The letters and documents referred to in this part of the Reply Brief are available for inspection by the Attorney General. In addition, petitioner will have them in his possession when he appears for oral argument on December 13. Meanwhile, copies will be made and furnished on request. (Most, if not all, of these papers are already in the files of the Clerk of the court below or of the Attorney General.)

The Clerk replied, in a letter of March 7, 1960,

> As far as this office is informed the Court has not authorized anyone to receive service. It would be my suggestion, however, to make service on Richard H. Cain in this matter.

Mr. Cain is Secretary of the Committee on Character and Fitness.

2. The Attorney General reports that petitioner "did serve the Chicago Bar Association or its counsel *with a copy* of his petition." (Italics added.) This is inaccurate: neither the Chicago Bar Association nor its counsel was served. Rather, acting on the suggestion of the Clerk of the Supreme Court of Illinois, petitioner served on March 16 the Committee on Character and Fitness by mailing a copy of his Petition to the Committee Secretary, Mr. Cain. But petitioner also served separately the Chairman of the Committee, the Chief Justice of the Supreme Court of Illinois and the Clerk of the Supreme Court of Illinois. (Thus, four officials are listed as served in the Proof of Service filed in this Court.) In addition, petitioner provided the Committee Secretary with approximately twenty copies of his Petition for the various members of the Committee and sent copies to other members of the court below as well as to the Chief Justice. Thus, instead of the single copy referred to by the Attorney General, petitioner provided the adverse parties more than two dozen copies of his Petition.

3. It is suggested that *the* copy of the Petition served on the "Chicago Bar Association" was not forwarded to the Attorney General "presumably[4] because they could not

---

[4] This use of "presumably" reflects the dubious use of "presumption" throughout the Attorney General's brief. See pages 24-27, this Brief.

reasonably suppose the petitioner would not serve the State's only counsel in a case against the State." What basis is there for this presumption? It is implied that the "Chicago Bar Association" (*i.e.*, the Committee on Character and Fitness) would have forwarded the Petition had it been suspected that petitioner had not served the Attorney General. But it is apparent, both from petitioner's letter accompanying the Petition for a Writ of Certiorari and from his Notice of Docketing (copies of which were sent to the four officials in Illinois), that the committee and the court below were again and again clearly informed whom petitioner had and had *not* served: for petitioner listed, in the documents provided the committee and the court below, all persons to whom these official papers and notices were being sent. There was no need for anyone to "reasonably suppose" anything: at least four Illinois bar admission officials—the Chief Justice and the Clerk of the court below, the Chairman and the Secretary of the committee—were informed, in effect, that the Attorney General had not been served. Thus, an examination of these papers[5] reveals not only that the court below and its committee had been served but also that both the court and the committee were put on notice that no one else had been served.

4. All this follows a familiar pattern. Petitioner had difficulty learning in 1955 whom to serve when he filed in this Court an appeal from the 1954 decision of the court below. It was not until almost two months after his Jurisdictional Statement of January 6, 1955 was filed and served on the same four officials referred to above—and after several inquiries had been made of the Chief Justice

[5] See Note 3, this Brief.

and of the Clerk of the Supreme Court of Illinois—that petitioner was told by the Chief Justice that he might deal with a particular Assistant Attorney General.[6] Even so, it was made clear to petitioner that an authorization had been made at that time and for that purpose: these limitations were set forth in the Assistant Attorney General's letter to petitioner of March 24, 1955:

> In the matter presently pending in the Supreme Court of the United States, No. 532, entitled: *In re George Anastaplo*, the Chief Justice has authorized me to accept service on behalf of the Supreme Court of Illinois. Neither his authorization nor my acceptance should be construed as an admission that the Court or any judge thereof is a party to this litigation.

The emphasis here upon authorization for a limited purpose has disposed petitioner to be cautious: it is partly for this reason that he has made inquiries of the court

---

[6] Inquiries were made by petitioner (or, as he was then, appellant) in letters to the Clerk of the court below (December 14, 1954; December 19, 1954; December 29, 1954) and in letters to the Chief Justice of the court below (January 6, 1955; January 7, 1955; February 15, 1955). On February 23, 1955, petitioner was advised by the Chief Justice of the court below, " . . . John Davidson, the Assistant Attorney General at Springfield, Ill., will be glad to cooperate with you in the matter of your appeal to the Supreme Court." The Jurisdictional Statement, to which no response was made by appellee, was filed January 6, 1955. (For these letters, see Note 3, this Brief.)

[7] The Assistant Attorney General's letter was in response to petitioner's inquiry of him, March 22, 1955, "Could you please let me know whether, in the future, I may address all correspondence and serve any further papers with reference to this litigation to you alone? That is to say, should I consider you the attorney for both the Supreme Court of Illinois and the Committee on Character and Fitness?" (See Note 3, this Brief.)

below and that he still serves both the character committee and the court below on all occasions.[8]

5. The Attorney General emphasizes that he "is the only counsel who represents or can represent Illinois in this court"; he describes himself as "the State's only counsel in a case against the State." Yet, it is not "the State" or "Illinois", in the usual executive sense, that is involved here; rather, it is the State of Illinois as it exercises power through the Supreme Court of Illinois. The Attorney General refers to the *Summers* case, "in which it was the Attorney General of Illinois, not counsel for the Chicago Bar Association,[9] who represented Illinois." But even this must be qualified: for it is recorded, at 325 U.S. 562, that

> William C. Wines, Assistant Attorney General of Illinois, with whom George F. Barrett, Attorney General, was on the brief, *for the Justices of the Supreme Court of Illinois, respondents.* [Italics added.]

Even the title of the Attorney General's recent document, "Brief for the State of Illinois, Respondent," incorporates a significant change from the language used in one of the *Summers* case documents, "The Return of the Chief Justice and the Associate Justices of the Supreme Court of Illinois to this Court's Rule to Show Cause . . . ." Strictly speaking, the Illinois Supreme Court seems to think that it,

---

[8] The 1955 authorization could not have been regarded by petitioner as still in effect. It must be remembered that this case is not technically the same as the 1955 appeal. Thus, petitioner has been again required to pay docketing fees to the Clerk of this Court. It should be noted, however, that both the Attorney General and petitioner recognize the importance of the earlier case (or, as one might call it, the earlier phase of the decade-long case) for a proper understanding of the present controversy (Att'y Gen'l, 9, 30; this Brief, 12-17).

[9] A further correction is needed here: it was not the character committee sitting in Chicago but another sitting in Decatur before which Mr. Summers had appeared.

rather than "the State of Illinois" (in the usual sense), is the Attorney General's client. And that client was served by petitioner.[10]

It is hardly appropriate for an applicant for admission to the bar either to advise the Supreme Court of Illinois whom it should authorize as counsel or to anticipate the authorization a sharply-divided court might choose to make *at some stage* of the proceedings. Such an applicant treads on delicate ground, as is evident from the fact that he can be criticized even when he has been prudent enough not only to make inquiries but to do far more than he was advised to do by an official presumably in the position to know the current disposition of the court below.

6. The Attorney General does not endeavor to explain why he waited six months, after learning of the grant of the petition on May 2, to raise the objection he now raises.[11] No doubt this Court would have been willing to consider his objection to a grant of certiorari if approached early and with a showing of good cause. Petitioner would not

---

[10] There is appended to "The Return of the Chief Justice, etc.," referred to in the text, the following affidavit of November 6, 1944, "William C. Wines, being first duly sworn upon his oath, deposes and says that he is an Assistant Attorney General of the State of Illinois, that *the Justices of the Supreme Court of Illinois, have requested the Attorney General of the State of Illinois to prepare and present the foregoing return and the brief in support thereof,* that this affiant has read the foregoing return, that he knows the contents thereof, that the same are true and that he makes this affidavit by the authority of the Attorney General of the State of Illinois." (Italics added.)

[11] It is unfortunate no one in the Attorney General's appeals division noticed the March 1960 issue of the *Illinois Bar Journal* which had as a headlined story on its prominent "Late Dateline" yellow page (facing the inside front cover), "Anastaplo and Molitor Opinions Appealed to U. S. Supreme Court." Petitioner does not suggest, of course, that an account in a legal journal would suffice to remedy an inadequate service. (See, also, 28 *U. S. Law Week,* 3295, April 5, 1960.)

have objected to a reconsideration, for he is not interested in securing any technical advantage, even if he should be entitled to it. Indeed, petitioner does not object even now to a reconsideration by this Court of its grant of certiorari. But he must object to the manner in which the Attorney General has proceeded to undermine petitioner's reputation and standing with this Court and with the profession at large. Had the Attorney General troubled to make the obvious inquiries of his clients, he would have spared petitioner the effort and expense called for by this portion of his Reply Brief.

7. Lest it be thought that the Attorney General's carelessness and unfairness were provoked by sharp practices on the part of petitioner, as counsel *pro se*, something should be said about petitioner's relations heretofore with his adversaries. It must be noted, first of all, that the character committee and its secretary do not treat petitioner as one whose character and fitness make him suspect as opposing counsel. Thus, for example, the character committee accepted every one of an extensive set of suggested record corrections by petitioner before the case was docketed in the court below.[12] The committee went so far as to entrust petitioner with the responsibility for inserting these corrections in the record submitted to the court below for review of the committee's action.[13] Or, to take

---

[12] See, *e.g.*, R. 366, 448-449.

[13] And when, upon receipt of the certified record petitioner carefully checked all the corrections against the various approved lists of corrections and found some corrections not previously submitted to the committee for adoption, he notified the adverse parties, attempted to remedy the matter by stipulation (which was later done), and attached to the certified record a notice which concluded, " . . . petitioner has marked on the record with a red check all such unauthorized corrections. Both the Clerk of the Supreme Court of Illinois and the Committee on Character and Fitness have been informed of this arrangement." (See Note 3, this Brief.) (For examples of petitioner's corrections, see p. iii, this Brief.)

another example, petitioner made arrangements on his own initiative for providing the Attorney General (after he entered his appearance as counsel for respondent) with page proofs of the Brief on the Merits three months before he was obliged to serve that brief on the adverse parties, even anticipating by several weeks the request of the Clerk of this Court that he do so. And when, upon receipt of the printed record, the brief was put in final form and formally served, petitioner voluntarily supplied the Attorney General with a careful list of the few minor deviations from the page proofs petitioner had furnished him months before. Instances of this kind can be multiplied: but these should be sufficient to indicate that petitioner has always tried to play fair with his opponents.

Petitioner's position of the last decade has been sustained, in part, by the misgivings he has about the character and competence of the American bar of our time. It would be self-defeating if petitioner should not himself apply the standards he has advocated for others:[14]

---

[14] Concluding passage of a lecture, "Freedom, Justice and the Rule of Law—An Introduction to Due Process of Law," delivered by petitioner at the Hillel Foundation Jewish Student Center, The University of Chicago, January 25, 1959, as one of a series of lectures on "Justice." In a footnote to this passage (in the mimeographed version of January 1960), petitioner suggests, "The institution of due process, as we know it, seems to have as one of its supports the assumption that it is an instrument that can do more good in the hands of men of good will than harm in the hands of bad men. The problem of both deliberate and ignorant misuse of this instrument may best be attacked by raising the quality of the bar. The quality of the bar may be raised partly by the profession being much more selective than at present about who is permitted to enter and to remain in the bar, partly by fundamental changes in the curriculum of the law schools (changes *not* in accordance with the trend to add "social science" material)." (See, on the lawyer's education, the changes implicitly suggested by Notes 23 and 61 of this Brief as well as by Note 56, Brief on the Merits.)

For an instructive account of how responsible and well-trained lawyers exercise the power of a state, see Jowitt, *Some Were Spies* (1954), especially the chapter, "The Royal Mail Case," pp. 164-184; Phillips, *Felix Frankfurter Reminisces* (1960), pp. 48-49 (*cf.* pp. 203-204).

". . . The bar, as well as the conscientious and informed citizen, needs the aid of sober and sobering custom and tradition in its effort to secure justice and the blessings of liberty. Such aid is needed if responsible men are to withstand the waves of passion that can sweep a people. Perhaps truth can win out against error if there is a free and open encounter. Perhaps. But, in political matters, we often cannot wait for reason to have its effect; we often cannot afford to let matters ride until passion is dissipated or until old truths are rediscovered. We have to make use of and defend as if unassailable the partial truths inherent in our time-tested institutions.

". . . But, in the final analysis, rules of law, if they are to be useful, must be applied by men who have not only a respect for rules but also self-respect. . . . Just as no rules can be drawn to cover all situations, neither can a system of law be entirely policed by courts of appeal. Much has to be left to the decency, fidelity and courage of the men, in all the branches of government, national and local, who make daily the bulk of decisions affecting the lives and fortunes of their fellow citizens. We must never forget that the principal classical writers set before us as a standard of the best possible government one in which the truly wise man ruled. Thus, the rule of law, with its inability to anticipate all circumstances and with its necessary reliance upon men who are far from the wisest, is itself an inevitable compromise with the best. It is a compromise that can best preserve for us—a people of our tradition, temper and institutions—a decent community when good men become lawyers or lawyers good men.

"I have stressed the role of self-respect. We must be, as Elihu Root, an eminent American lawyer of another generation, once counselled, fully conscious of 'the moral quality of honor that underlies all Anglo-American jurisprudence.' Perhaps, indeed, it might be concluded that ultimately a civilized rule of law can endure only among a people which cherishes an abiding, yet moderate, respect for honor.'

II. The Attorney General's Argument on the Merits: Comments and Corrections.

Petitioner considers his position to be reinforced by the arguments on the merits made by the Attorney General, once those arguments are viewed in the proper light. In support of this claim he limits himself to a seven point reply.[15]

1. On the relation between the Declaration of Independence and the inquiries into possible political affiliations.

The contribution of the Attorney General must be acknowledged with respect to one vital point. Since he recognizes the unusual scope of the inquiries directed to petitioner (Att'y Gen'l, 9, 30), the Attorney General further recognizes that some justification must be given for such inquiries or, at least, that some explanation must be made of how they came about, particularly when the character and fitness evidence (in the ordinary sense) is so favorable to the applicant for admission to the bar.[16] Faced by this problem, the Attorney General has done what the Illinois bar authorities have heretofore refused to do: he has admitted that the inquiries about affiliations were provoked and (he argues) justified by petitioner's opinions about the right of revolution. (Att'y Gen'l, 9, 30)

---

[15] This detailed reply is made necessary by the nature and extent of the Attorney General's misapprehension of the issues, just as the extent and nature of petitioner's hearings resulted from the character committee's misapprehension of its purpose and authority. *Cf.* Att'y Gen'l, 29. See Note 42, this Brief.

[16] The inadequacy (or absence) of such justification or explanation would seem to raise serious objections with respect to both equal protection (unjustified discrimination) and due process (*e.g.*, refusal to abide by the evidence).

Petitioner has always claimed that this "provocation" came during his first hearing before the character committee.[17] The Attorney General, however, points to materials written by petitioner before that first hearing of November 10, 1950, rather than to the testimony of that hearing (where petitioner first "assumed the intransigent stance" he has since maintained).[18] Petitioner is willing to accept the Attorney General's view of the facts and to examine the implications of that view.

Thus, the Attorney General explains the origin and justification for the affiliations inquiries in this manner,[19]

---

[17] R. 140-142, 188, 315, 320-331, 332-333, 339-342, 365, 420, 438, 483; Brief on the Merits, 83-84 (also, Note 15). See the quotation in Note 21, this Brief.

A substantial part of the transcript of the record of the 1950-1951 hearings is printed at 12 Lawyers Guild Review 163-176. One is reminded, upon reading that ten-year old transcript, of petitioner's declaration to the character committee in 1958 (R. 363-364), "I have put on record a reasonable, humane and just alternative to what this Committee has been doing. I have, of course, made mistakes during these many hours of interrogation and conflict. But one thing is clear: I have learned through the hours and years: my position has become stronger, and the need and justification for it more and more apparent to those who will but read, pause and reflect . . . I grant you have the power to intimidate young applicants for admission to the bar, but only those applicants who, in the words of the Canons of Ethics, have forgotten or who have never been taught 'that the profession is a branch of the administration of justice and not a mere money-getting trade'." Compare the quotations in Notes 66 and 67, this Brief (incorporating reactions ten years apart).

[18] Att'y Gen'l, 30, 9. This view of the Attorney General's (that petitioner's prior written materials prompted the committee's affiliations questions) is one shared by three students of the case: (1) Brown, Loyalty and Security (1958), 111-112; (2) Note, 50 Northwestern Univ. L. Rev. 94 (1955); (3) Trumbull, "Observations on Recent Illinois Supreme Court Decisions," 42 Chicago Bar Record 57, 60 (November 1960). *Cf.* Note 15, Brief on the Merits.

[19] Att'y Gen'l, 30. The Attorney General does not attempt to justify either the repudiated religion inquiries or those relating to the Democratic and Republican Parties, all of which petitioner refused to answer. R. 22-26, 137-138, 182-184, 185-194, 256; Notes 23, 41, 61, Brief on the Merits.

> If petitioner means to suggest that the Committee on Character and Fitness must ask every applicant questions as to his possible memberships in and affiliations with subversive groups or may ask none of them any such questions, his argument seriously misconceives the Committee's functions and gravely misprises the import of equal protection.
>
> Petitioner had admittedly written some prose that could not possibly disqualify him *ipso facto* from any right or privilege to which he was otherwise entitled but that did awaken *a most natural inquiry* as to what he meant by it. [Italics added.]
>
> He *thereupon* assumed the intransigent stance that he has maintained *for nearly ten years*[20] and has refused to answer perfectly proper questions for that period of time. [Italics added.]

Earlier, he says (Att'y Gen'l 9),

> Petitioner's published utterances on the right of revolution did not and could not constitutionally disqualify him from the practice of law. But they were of such tenor as permissibly prompt questions that are not invariably or even usually addressed to other candidates.

The only prose petitioner wrote ten years ago which was brought to the attention of the character committee at the time he first "assumed [his] intransigent stance"—certainly the only such prose that could conceivably be considered "published utterances on the right of revolution"—, is to be found in his questionnaire of October 26, 1950. It is, in short, the essay he wrote in response to the committee question, "State what you consider to be the

---

[20] This "intransigent stance" was first assumed during petitioner's initial appearance before the character committee, November 10, 1950. The Attorney General's brief was filed November 4, 1960 (*i.e.*, "nearly ten years" later).

principles underlying the Constitution of the United States." Petitioner's essay reads,[21]

> One principle consists of the doctrine of the separation of powers; thus, among the Executive, Legislative, and Judiciary are distributed various functions and powers in a manner designed to provide for a balance of power, thereby intending to prevent totally unrestrained action by any one branch of government. Another basic principle (and the most important) is that such government is constituted so as to secure certain inalienable rights, those rights to Life, Liberty and the Pursuit of Happiness (and elements of these rights are explicitly set forth in such parts of the Constitution as the Bill of Rights). And, of course, *whenever* the particular *government* in power *becomes destructive of these ends, it is the right of the people to alter or to abolish it* and thereupon to establish *a new government*. This is how I view the Constitution. [Italics added.]

The critical language relating to the right of revolution, according to the Attorney General's rationale, must be the sentence which includes the italicized words: it is this

---

[21] The essay is found at page 9 of the record certified to this Court in 1955. This is the passage referred to by the "three students of the case" cited in Note 18, this Brief. The passage is virtually the same as its counterpart in petitioner's current questionnaire (R. 381-382). The October 26, 1950 questionnaire was the only item (in the record) which had been written by petitioner when he first appeared before the character committee, November 10, 1950. The only other items in the record were the character references and affidavits, required by committee rules, submitted by a dozen lawyers and citizens. Of this original record one of the commissioners said *at the conclusion* of the appearance where petitioner first assumed his "intransigent stance", "Your record, which I have just skimmed through, indicates that your teachers had the greatest regard for your Americanism and moral principles, and I am also aware of the fact that you have served in the Air Force and that you . . . were a part of the armed forces fighting for a cause." (Record certified to this Court, 1955, p. 17.) (See Notes 23 and 64, this Brief.)

utterance which, although not disqualifying or "seditious", is "of such tenor as permissibly prompt[s] questions that are not invariably or even usually addressed to other candidates." (Att'y Gen'l, 9, 30n)

Petitioner has often maintained that he has been given special treatment by the character committee primarily because of his defense of the *principles* of the Declaration of Independence.[22] Now the Attorney General, speaking on behalf of the Illinois bar authorities, confirms this claim in ample measure. For the Attorney General attempts to justify the committee's affiliations inquiries as called for by language the tenor of which no American should be obliged to defend or even explain: *for petitioner had providentially drawn the fatal (italicized) language, word for word, from the Declaration of Independence.*

The principal merit of the Attorney General's brief lies in the fact that it concedes what petitioner has for ten years hoped someone would admit. It is appropriate to restate here the argument petitioner advances at pages 83-84 of his Brief on the Merits (omitting footnotes):

> Petitioner has been penalized, throughout his association with the Illinois bar, for the expression of his views on the Declaration of Independence and the right of revolution. It was only because committee members took offense at petitioner's views on this subject (which were elaborated in response to questions) that he was asked about his affiliations in the first place. Continuing resentment toward his perfectly proper views on rightful rebellion is to be seen throughout the present record and crops out several times both in the committee majority report and in the *per curiam* opinion of the court below. But if anything is protected by the First and Fourteenth Amendments against attack by the States, surely it

[22] See the citations of the record, Note 17, this Brief.

must be the expression of that fundamental American political opinion, a belief in the Declaration of Independence and the right of revolution.[23]

2. On what petitioner, the Attorney General and the character committee "should have known."

The argument advanced by the Attorney General which is probably intended as his principal one is set forth at page 10 of his brief,

> Petitioner should have known at the time of his first appearance before Illinois' Committee on Character and Fitness, was explicitly told by a unanimous Supreme Court of Illinois on September 23, 1954, and was again informed by that still unanimous court on September 17, 1957, that he would not be eligible under Illinois' law for admission to the State's bar until he answered questions concerning his possible membership in or contacts with subversive or other criminal organizations.

Taken literally, this statement suggests that no applicant is admitted to the Illinois bar until he *has* answered such questions. But, as the Attorney General concedes elsewhere (Att'y Gen'l, 8-9, 30), few if any other applicants are subjected to the inquiries to which petitioner has been subjected. Presumably, few members of the bar have been shown to be eligible—unless, of course, there is substance to the Declaration of Independence foundation that the Attorney General points to as justification for an insistence upon something special of petitioner. (See pages 12-16, this brief.) But we must go on to the evidence adduced for the claim of that which petitioner "should have known"

---

[23] "We have room for but one loyalty, loyalty to the United States. We have room for but one language, the language of the Declaration of Independence and the Gettysburg speech." Charnwood, *Theodore Roosevelt* (1923), xix. See Abraham Lincoln's Springfield speech of June 26, 1857 (*Complete Works*, Nicolay-Hay edition, 1902, I, 232) (also, R. 495). *Cf. Brown* v. *Board of Education*, 347 U.S. 483, particularly Note 11.

at various stages of his dealings with the character committee, evidence which is seen in the "notice" said to have been given by three court opinions.[24]

(a) "The first unmistakably plain utterance of Illinois' relevant requirements became accessible" when this Court decided *In re Summers*, 325 U.S. 561 (Att'y Gen'l, 12). But that case says nothing at all about the principal problem presented by the present case, the effect to be given to a conscientious refusal, on constitutional and other grounds, to answer questions about political affiliations ("subversive" or otherwise). In the *Summers* case, the applicant answered all questions put to him. Mr. Summers (a conscientious objector) was denied admission because he could not say he would take up arms in time of war to defend the constitutions of the state and nation. This reservation was thought to make it impossible for him to support the Illinois Constitution in its entirety.[25] The case against petitioner, on the other hand, does not arise from his refusal to abide by any provision of the Illinois Constitution; rather, it can be traced back to his defense of principles incorporated in the Illinois constitutional provisions which protect freedom of speech and due process of law, which reaffirm inalienable rights, and which prohibit test oaths.[26]

---

[24] This "should-have-known" contention is a belated attempt to qualify the Illinois bar authorities for the exception left open in the *Konigsberg* opinion, 353 U.S. 252, at 261. Nothing is said by the Attorney General of the much clearer "notice", supporting petitioner's position, given by a unanimous court in *In re Holland*, 377 Ill. 346, 36 N.E. 2d 543 (cited in *Konigsberg*, 353 U.S. at 270) (see Note 64, this Brief).

[25] Reference was made to the militia provisions. Illinois Constitution, Art. XII, Sections 1, 6.

[26] Illinois Constitution, Art II, Sections 1, 2, 4; Art. V, Sec. 25 (R. 53).

It should be recognized, furthermore, that the *Summers* case is of limited validity today, whatever it once stood for. The Attorney General, at pages 13 and 32, quotes from the most important passage in the opinion of this Court in that case, stressing the decisive argument that "a like interpretation of a similar oath as to the Federal Constitution bars an alien from national[27] citizenship." This passage and its decisive argument are buttressed in the same paragraph of the *Summers* opinion by several citations to the *Schwimmer* (279 U.S. 644) and *Macintosh* (283 U.S. 605) cases and by a quotation from the *Macintosh* opinion. (325 U.S., at 572-573) But the Attorney General neglects to mention that those cases have since been overruled by *Girouard* v. *United States* (328 U.S. 61): the repudiation of *Schwimmer* and *Macintosh* in 1946 certainly leaves the 1945 *Summers* doctrine in doubt, to say the least.[28]

(b) "The next definitive statement" putting petitioner on notice is found, it is said, in the unanimous 1954 decision by the court below, *In re Anastaplo*, 3 Ill. 2d 471 (Att'y Gen'l, 13-14). Once again, no attempt is made by the Attorney General to assess the effect of intervening decisions by this Court.[29] Indeed, that 1954 opinion was

---

[27] The modifier, "national", is omitted the second time the passage is quoted by the Attorney General.

[28] For an instructive parallel, see the careless use made by a commissioner before the character committee of the repudiated *Rockafellow* case, 17 Ill. 541, to justify religious inquiries. R. 188-189, 206, 259-276.

[29] *Konigsberg* v. *State Bar*, 353 U.S. 252; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232. The Attorney General does not seem to appreciate that his admission of the reason why petitioner was first asked about affiliations (Att'y Gen'l, 9, 30) repudiates the description of the sequence of inquiries on which the rationale of the 1954 opinion depended. (3 Ill. 2d at 474). R. 199-201, 203-204, 260, 325-33. See Note 28, Brief on the Merits.

unanimous, but the court below is in 1960 far from unanimous as to what that opinion stands for. Thus, Mr. Justice Schaefer and Mr. Justice Davis, in their dissenting opinion in the present case, make the following assessment of that earlier opinion,

> Our prior decision determined that questions concerning the applicant's membership in the Communist Party or in subversive organizations were relevant, and we must now determine the consequence to be attached to his refusal to answer them.[30]

It should not be said that an applicant who accepted such an assessment as this of the meaning of the 1954 opinion is given the "notice" or "warning" the Attorney General finds. Even the character committee was not aware of this "notice": for again and again it refused to say that a refusal to answer affiliations questions would in itself be conclusive. The most the committee chairman could say was,[31]

> Now you have asked for a warning when we put a question to you that we think is a pivotal, important question in connection with your qualification. I must tell you that we consider that question, "Are you a

[30] Appendix, Pet. Writ. Cert., 79. The committee chairman made a similar assessment, "We have the ruling of the Supreme Court of Illinois that it was a proper question." (R. 136) But consider Mr. Justice Bristow's insistence that a bar admission committee is "charged only with ascertaining applicant's moral character, and in no way authorized by statute or rule of court to investigate or reject members of any political persuasion from the profession." (Appendix, Pet. Writ. Cert., 67)

[31] R. 102-103. See, for other instances of the same, R. 4, 30, 31, 34, 135, 237, 245, 294-295, 296-297; Note 59, Brief on the Merits. (See, also, Note 32, this Brief.) The committee chairman properly stated the committee's responsibility when he said, "We have an ultimate question before us, whether you have a fit character to entitle you to be admitted to the bar." (R. 281)

> member of the Communist Party," such a question; and that the refusal to answer it may have serious consequences to your application. I am not prejudging you in this regard; and I haven't the slightest idea how any other member of the committee is going to vote on this proposition. I have not, for that matter, made my own mind up as to how I am going to vote. But I can see that it would well be an important question in dealing with your qualification. . . .

The Attorney General does not appreciate the reservations that are seen in this passage and elsewhere in the record: rather, he seems to say that *both* the committee and petitioner "should have known." [32]

(c) The most puzzling piece of evidence the Attorney General advances in support of his "should-have-known" principle is found in the contention (Att'y Gen'l, 15),

> It was again made plain to petitioner on September 17, 1957, by a still unanimous Supreme Court of Illinois that so far as Illinois law was concerned, he was ineligible for admission to that state's bar until he answered questions concerning such associations.

The Attorney General then reproduces in its entirety the Order of September 17, 1957, an order which petitioner had

---

[32] It should not be inferred from the Attorney General's insistence upon the advisory role of the character committee that no definite or clear-cut notice or warning could have been given by the committee. (Att'y Gen'l, 16) The committee could well have said to petitioner (if so minded) that his refusals to answer would definitely compel it to make a recommendation against admission. The nearest any member of the character committee came to giving a clear-cut warning came when petitioner refused to answer questions about religious beliefs. (R. 193-194)

The absence of a warning (based on statute, rule or practice) implies that refusals to answer questions will be evaluated in the context of the particular hearing. Thus, automatic disqualification (on a technical finding of "obstruction") seems to be ruled out.

secured when the character committee had refused to reconsider his application after the *Schware* and *Konigsberg* decisions (R. 484). Petitioner has pointed out on several occasions that this Order does not require the character committee to ask about petitioner's possible political affiliations or associations.[33] Indeed, in its context, the Order must be understood as a tactful indication by the court below to its committee that such inquiries need not—perhaps, even, should not—be made. The failure of the court below to mention the much-discussed inquiries into affiliations cannot be dismissed as a mere oversight.[34] Yet the Attorney General now suggests that the character committee was not only permitted but even required by the 1957 Order to insist upon the affiliations inquiries. He does not try to explain why the hearings continued as long as they did after petitioner had served notice upon both the court below and its character committee that he would not answer supposedly essential questions (R. 484-490). Thus, the Attorney General disregards here the context of the Order in the record and the sequence of events.

Petitioner does not deny that he would continue to refuse to answer affiliations questions even if "plainly informed by Illinois' Supreme Court that he would be ineligible for admission to the bar of Illinois until he answered questions of the sort involved in this case" (Att'y Gen'l, 2-3). But he does deny that he or any other applicant *has* been "plainly informed"—and he calls upon the Attorney General to cite a single rule, statute, opinion or even practice of the court below or of its committee which provides that

---

[33] R. 61-62, 70, 88-89, 91-92, 119, 160, 195-196, 297 (see, also, R. 500-502); Brief on the Merits, Notes 5, 52.

It should also be noted that both the 1957 Order and the 1954 Opinion of the court below, as interpreted by the Attorney General, are *ex post facto* with respect to an applicant who started law school in 1948 and first applied for admission to the bar in 1950.

[34] Strauss, Persecution and the Art of Writing (1952), 24-26.

an applicant for admission to the bar must answer all questions put to him by a committee on character and fitness.[35]

Petitioner reaffirms his claim that a refusal to answer certain kinds of questions must be evaluated in the light of the reasons given by the applicant, of the record made in the case, of the foundation laid for the questions, and of the purposes of the character committee. Nowhere does the Attorney General assess or even mention the concessions made by the committee and adopted by the court below:[36]

> [The character committee:] . . . no one has stated to this committee that you are or have ever been a communist, or a member of the Communist Party, or a member of the Ku Klux Klan, or a member of the

[35] The retreat of the committee from the religious questions, after several weeks of resistance by petitioner, is instructive about the practice, as is the failure of the committee even to mention the unanswered questions about the Republican and Democratic Parties. (See Note 19, this Brief.)

[36] R. 234; Appendix, Pet. Writ. Cert., 39. An observer from another time or place might wonder what conflict remains after these concessions. He might even wonder whether the differences here can be dismissed as only "semantical". (See, *e.g.*, R. 81-85.) But to see all this as merely a question of "semantics" would only reveal a lack of appreciation for the tenor of the times and for the issues underlying this confrontation between a citizen and his state. Consider, for instance, Daniel Webster's approach to just such depreciations of fundamental issues: "[The fathers of the American Revolution] poured out their treasures and their blood like water, in a contest against an assertion [by the Parliament of Great Britain] which those less sagacious and not so well schooled in the principles of civil liberty would have regarded as barren phraseology, or mere parade of words. They saw in the claim of the British Parliament a seminal principle of mischief, the germ of unjust power; they detected it, dragged it forth from underneath its plausible disguises, struck at it . . . " (R. 436-437, 147-148, 149-150)

organizations, or any one of the organizations listed as subversive by the Attorney General's list.

[The court below:] The committee says that it has not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation, and that it has received no information from any outside source which would cast any doubt on Anastaplo's loyalty or which would tend to connect him in any manner with any subversive group.

This case with its long record must be seen as a whole, not as something that can be disposed of with an empty phrase. Or, as the court below observed in a disbarment case cited by the Attorney General on another point (Att'y Gen'l, 17n), "Barren technicalities should not be allowed to submerge the truth in proceedings of this character."[37]

3. On the Attorney General's "presumption" theory.

The Attorney General attempts to improve further upon the rationale of the Illinois bar authorities with a novel use of the concept of "presumption." We presume to suggest that every time this concept is employed in his brief, it represents an attempt to beg the question.[38]

The Attorney General's "presumption" illustrations may be reduced to two sets of cases.

(a) We are told about the requirement of an applicant for a ballot to establish certain qualifications, about the requirement of an applicant for a marriage license to make

---

[37] *In re Heirich*, 10 Ill. 2d 357, at 367. When viewed in the proper light, this case, too, supports petitioner's application. See Note 34, this Brief.

[38] We further presume to suggest that the Attorney General would much prefer to say that there is an inference of bad character raised because of petitioner's reliance upon constitutional rights. But the *Konigsberg* case (353 U.S., at 270) is too clearly against *that* phrasing.

certain declarations, and about the requirement of certain elements of proof before a will may be admitted to probate (Att'y Gen'l, 7, 28, 29). But in each of these situations, the reference is to requirements specifically elaborated by statute.[39] Such would have been the case here if there had been a statute or rule requiring applicants for or members of the bar to certify that they did not belong to particular organizations.[40] Instead, the only relevant statutory requirement affecting an applicant for admission to the bar, in addition to the oath which petitioner has always been willing to subscribe, is that he establish his character and fitness, not that he deny membership in any particular organization.[41]

(b) The Attorney General's second set of illustrations deals with damage suits relating to libel and automobile

---

[39] Ballot: Ill. Rev. Stat. 1957, Ch. 46, Sections 4-2, 4-8, 5-1, 5-2, 5-7, 5-9. Marriage: Ill. Rev. Stat. 1959, Ch. 89, Sec. 6; Ch. 38, Sec. 75. Probate: Ill. Rev. Stat. 1959, Ch. 3, Sections 194-43, 221-69, 224-72, 226-74. To make each of the situations described by the Attorney General comparable to that of petitioner's, the clerk or registration officer should, without any change in the relevant statutes, attempt to exact statements denying membership in various political parties (on the theory, for example, that Communists do not "believe in" marriage and therefore should not be able to secure a license for that purpose).

[40] The Attorney General sets forth in his brief just such a statutory requirement affecting state employees. (Att'y Gen'l, 24) The absence of such a requirement for lawyers is significant. See pages 30-31, 38, this Brief. Public employees, on the other hand, are not required to establish their "character and moral fitness" (a requirement which would usually be regarded as much more difficult to comply with than the signing of an affidavit).

[41] If there had been a statutory requirement that membership be denied by oath, petitioner would have had to consider challenging it as unconstitutional. (See Note 52, this Brief.) If the Attorney General is correct in his suggestion that this requirement is implicit in the language, "character and fitness," then there are raised here far-reaching issues relating to freedom of speech.

accidents (Att'y Gen'l, 26-28). In each of the situations described by the Attorney General, the refusal of the plaintiff to answer interrogatories relates to one of the principal, if not *the* principal, point at issue. Whatever the effect of the refusal in these situations—and on this we must reserve judgment pending further research [42]—, the problem in petitioner's case is radically different: whether an applicant is a member of the Communist Party or of the Ku Klux Klan would not ordinarily be an issue in a bar admission proceeding even if the character committee does not concede that it has absolutely no evidence connecting the applicant with either of these organizations.[43] The only issue is whether the applicant is morally fit for the practice of law.

---

[42] One difficulty faced here by petitioner is that the Attorney General's examples are not supported by citations to the law he relies upon. Petitioner finds that even some of the more plausible examples turn out to be questionable when subjected to close analysis.

Consider, for instance, the assumption that one who believes the earth is flat should not be permitted a license as an aeronautical navigator. (Att'y Gen'l, 31-32) A competent World War II navigator, however, did not have to decide whether the earth was spherical or flat: in fact, the navigator invariably employed "flat" charts for his operations and mapped his course from departure to destination as if the earth were flat. (Even the desirability of following great circle routes on very long flights raised no practical problem for the flat-earth man willing to obey the instructions of his superiors. Petitioner does not suggest, it should be stressed, that the compiler of the astronomical tables and of the charts a navigator must use may also proceed as if *he* thought the earth were flat. He speaks only of that about which he knows from his own experience. R. 380.)

In short, one must beware of the "obvious" when legislating qualifications and disqualifications. (Consider the bar applicant who believes either in the Kingdom of God or in the Kingdom of the Proletariat. R. 105-107, 427.)

Petitioner does believe the earth is pretty much a sphere, however.

[43] *Cf. Kimm* v. *Rosenberg*, 363 U.S. 405, which is said to rest on the application of a statutory provision that Communist Party membership is an "absolute disqualification" for resident aliens.

Neither of the sets of cases with which the Attorney General illustrates his "presumption" theory supports the suggestion that an applicant for admission is "required", in the ordinary [44] bar admission proceeding, to reveal his political affiliations ("subversive" or otherwise). The rules, statutes and principal issue that bear upon a bar admission proceeding do not require that questions about affiliations be answered or even asked, but (at most) that the refusal to answer whatever questions might happen to be asked must be evaluated with a view to its character and fitness implications. Indeed, it may be appropriate to commend, not condemn petitioner for having refused on principle to answer the kind of questions he has stood against for a decade.

Certainly, we cannot commend an innovation which seems to lead to the curious result that petitioner must be presumed to be, despite the unprecedented concessions of the character committee, a member of both the Communist Party and the Ku Klux Klan.[45]

---

[44] Of course, the Attorney General does suggest that petitioner's adoption of the language of the Declaration of Independence takes his case out of the ordinary. This suggestion is examined at pages 12-17 of this Brief.

[45] If the Attorney General wants to propose a new presumption, he would be well advised to develop for bar admission proceedings an adaptation of the presumption of innocence. (See petitioner's suggestion, R. 423-425, anticipating that of Mr. Justice Traynor of the Supreme Court of California in the second *Konigsberg* case, 344 P. 2d at 783.)

At the least, the Attorney General might advocate that one who has served his country as an Air Force officer should be presumed to be a good citizen until someone ventures to proffer evidence to the contrary. After all, the "grateful citizens of the State of Illinois" did extend to petitioner in 1947 a "Citation for Meritorious Service" for "having served patriotically and faithfully in the Armed Forces of the United States during World War II." (Petitioner's 1953 brief in the court below, p. 110). *Cf.* Shakespeare, *Coriolanus* (see Note 61, this Brief).

4. On the relation between a voir dire and a bar admission proceeding.

A superficially attractive test of the propriety of questions to be put to bar applicants is suggested by the Attorney General: no man should be made a lawyer "who will not answer the very kind of questions that it will be his duty to compel prospective jurors, witnesses and other persons to answer . . . " (Att'y Gen'l, 35) But a moment's reflection should show that this simply will not do. Is there any question (even about the most intimate or sacred matters) that, in some circumstances, might not be asked of prospective jurors, to say nothing of witnesses?

The Attorney General's illustration is not a happy one: petitioner, he reports (Att'y Gen'l, 34),

> knows that if he becomes a lawyer and if his interest in cases involving freedom of conscience should lead him to defend an allegedly subversive person, he would have a duty to ask *every prospective juror in the case* whether the *venireman* had ever been a member of the Communist Party, whether he believed in the overthrow of the government by violence and whether he had any religious scruples[46] that would prevent him from serving as a juror or taking a juror's oath. [Italics his.]

In short, the Attorney General suggests, it would be the duty of defense counsel to expose and, in effect, disqualify precisely those prospective jurors who are most likely to be sympathetic to his "allegedly subversive" client!

The principal recent case dealing with alleged subversion is probably *Dennis* v. *United States*, 341 U.S. 494. Petitioner refers this Court and the Attorney General to the

---

[46] Does the Attorney General continue to rely on the discredited *Rockafellow* case? See Note 28, this Brief; R. 266.

voir dire conducted by the trial judge on that occasion.[47] *That* judge certainly does not, on behalf of defense counsel, ask the kinds of questions enumerated by the Attorney General as the duty of defense counsel to ask. He does ask, upon the suggestion *of the Government*, about membership in the Communist Party and the Ku Klux Klan. There is no pattern of questions either about belief in the overthrow of the government or about religious scruples. Did defense counsel and the trial judge fail to do their duty, thereby denying to the defendants "the rudiments of a trial by jury"? (Att'y Gen'l, 34).

It should be noted that the trial judge did ask, at the request of defense counsel, such questions as whether prospective jurors were members of the Liberal Party, the American Legion, the Socialist Party, the Knights of Columbus, Americans for Democratic Action, the Holy Name Society, the National Association of Manufacturers, the Catholic War Veterans or the Republican League.[48] According to the Attorney General, since these questions can be put to prospective jurors, answers to them can be required as well of any applicant for admission to the bar. This cannot be so. Even the character committee recognized *some* limits: after petitioner had resisted religious inquiries for several hours, the committee was compelled

---

[47] Trial Transcript, Volume IV, pp. 2667-3195 (March 8-17, 1949). See, also, *United States* v. *Dennis*, 183 F. 2d 201, at 226-227 (n 34, n 35).

[48] *Dennis* Trial Transcript, Volume IV, pp. 2748, 2750, 2751, 2752-3, 2756, 2782-3, 2849, 2955-6, 2982, 3147, 3148. One standard question put to all prospective jurors was, "Do you or does any close relative hold or have they held any office or position in or been a member of any committee of any political party?" Volume IV, pp. 2919, 3075, 3088-9.

to concede that such inquiries had no place in the proceeding.[49]

The *voir dire* analogy advanced by the Attorney General can best be understood as really supporting petitioner's position. For it is clear that the propriety of the questions asked of prospective jurors depends, in part, on the relevance and usefulness of the questions in securing an unprejudiced jury for the impending trial. Similarly, the questions appropriate for bar admission proceedings must be evaluated in the light of the purpose of the proceedings —in the light, that is, of character and fitness considerations.

Similar to this attempt to substitute *voir dire* standards for those appropriate to a character committee hearing is the Attorney General's suggestion (which is reminiscent of the *Summers* rationalization) that Illinois may "refuse to license as a lawyer one who is disqualified by law from holding any lawyer's positions or other public post in the state government" (Att'y Gen'l, 24). The Attorney General argues here from the statutory requirement of a non-Communist oath for all employees of the State of Illinois.[50] It should be a sufficient answer to point out that the lawyer simply is not a public employee and that his statutory oath includes no political tests.[51]

But, it should be also pointed out, it is not accurate to say that petitioner, if admitted to the bar without answer-

---

[49] R. 256. But not even the sky is the limit under the Attorney General's theory if a character committee sits in Indiana, where the State Supreme Court held in 1955 that prospective jurors may sometimes be asked about their religious faith and affiliations. *Wasy* v. *State*, 234 Ind. 52, 123 N.E. 2d 462 (citing, at p. 464, cases in other jurisdictions).

[50] Ill. Rev. Stat., 1959, c. 127, par. 166(b). (Att'y Gen'l, 24).

[51] The lawyer's oath is printed at page 8 of the Brief on the Merits.

ing the questions about affiliations, would be "disqualified by law from holding any lawyer's positions or other public post in the state government." He would still be eligible to sign the affidavit demanded by statute. Whatever may be the validity of a concrete non-Communist affidavit for those employed by the state,[52] there are good reasons for keeping out of bar admission proceedings the kind of extensive and unregulated inquiries to which petitioner has been subjected.[53] The issue is not whether petitioner might someday qualify for government employment, but whether he is presently qualified for the practice of law.[54]

---

[52] The Attorney General reports correctly that petitioner has not challenged the constitutionality of this statute. That is because petitioner has not seen fit to address himself to a statute which does not bear upon his matter. The statute *is* open to challenge, of course, on the basis of the First and Fourteenth Amendments of the Constitution of the United States as well as Article V, Section 25, of the Illinois Constitution. See, also, *Wieman* v. *Updegraff*, 344 U.S. 183.

[53] This distinction is reflected in the difference between the *Adler-Beilan-Lerner* line of cases (public-employees) and the *Garland-Konigsberg-Schware* line (attorneys). It is a distinction that is developed in the board's brief in *Beilan* (pp. 12-13) and in the brief *amicus curiae* of the State of New York in *Lerner* (pp. 23-24). See, also, R. 441-447, 501-508; Brief on the Merits, Note 45.

Furthermore, the affidavit approach has the advantage of confronting the applicant with a fixed, known oath, one that has presumably been prepared by experts and publicly adopted by competent authority.

Petitioner has observed on several occasions that his decision whether to resist such impositions would depend in part on his assessment of the circumstances and of the contribution he might make to the common good. (*E.g.*, R. 151, 216, 225) See Notes 66 and 67, this Brief.

[54] "So early as the statute 4 Henry IV. c. 18. it was enacted, that attorneys would be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty." Blackstone, *Commentaries*, III, 26.

5. On the Communist Party, the Ku Klux Klan and the horrors that menace civilization.

All kinds of things are said about the nature of the Communist Party and of the Ku Klux Klan.[55] We are told about race hatred, Anti-Semitism, Anti-Catholicism and sedition (which are all somehow associated with petitioner's stand) (Att'y Gen'l, 20-21).[56] But petitioner must still take what he conceives to be a lawyer-like position: that is, it is still his opinion that membership in either the Communist Party or the Ku Klux Klan is not sufficient ground for exclusion from the bar.[57] Nevertheless, it must be admitted, this seems, in the context of this record (which includes the sweeping concessions of the Illinois bar authorities), pretty much of an academic question.

Whatever the proper status of the Communist Party and the Ku Klux Klan, one may still have plausible constitutional and political reasons for resisting questions about these organizations. Whatever authority there may be for asking such questions, a principled refusal to answer them should have no adverse bearing upon one's character and fitness. Both logic and law suffer when lawyers are encouraged to stray from the bar's traditional concerns (Att'y Gen'l, 32):

> One who believes in treason, mass murder, genocide or other horrors that menace civilization is not the

---

[55] See Note 42, this Brief.

[56] One is reminded of the committee chairman's observation that he has "trouble with the concept of the scrupulous communist." (R. 182) No doubt, some would say the same about members of the Ku Klux Klan. But judgments of this kind do not take sufficient account of time, chance and geography, to say nothing of individual character. See Note 50, Brief on the Merits.

[57] See Note 15, Brief on the Merits.

> sort of person whom Illinois must admit to her bar even though he has not yet begun to put these beliefs into practice.
>
> If, as we submit, is true, Illinois may exclude petitioner from her bar if he holds arrantly dangerous or treasonable beliefs, she may certainly ask him whether in fact he holds these beliefs; for he and he alone really knows the answer to that question.

Certainly, petitioner has never hesitated to answer that he does not believe in treason, mass murder, genocide or any of the other horrors that might menace civilization.

6. On the use and abuse of the record.

There is not a single citation of or quotation from the transcript of hearings in the Attorney General's brief. This reflects the failure of the Illinois bar authorities to grasp the significance of the record with respect to the only issue before them, the qualifications of petitioner to practice law. There are, however, references to what is supposedly in the transcript, and several of these must be corrected.

(a) The Attorney General refers to a "procession of witnesses" on petitioner's behalf during the hearing (Att'y Gen'l, 29). But, one does not need to go to the transcript but only to the character committee report to learn that,

> During the hearings the Committee repeatedly reminded applicant that he had the right to be represented by counsel and to call witnesses, but he has preferred to rest his case on his own testimony and advocacy. [Appendix, Pet. Writ. Cert., 11].

There *are* in the record the dozen written character affidavits and references required by committee rules (R. 386-414), but in none of these is there any statement about petitioner's political affiliations or lack of affiliations, despite the suggestion of the Attorney General that petitioner tried to meet the burden of proof on this issue through "witnesses" rather than by his own testimony (Att'y Gen'l, 7, 29).

Neither petitioner nor his character references have spoken to the issue of Communist Party and Ku Klux Klan affiliations or introduced any evidence for the purpose of showing affiliations or lack of them.[58] Rather, both petitioner and his references have addressed themselves and have intended to address themselves only to the issue of his character and fitness to practice law. (Petitioner, in addition, has tried to show why the affiliations inquiries should play no part in the consideration of his application.) The Attorney General would have been accurate had he limited himself to the observation that only the character committee has spoken to the issue of memberships, admitting it had absolutely no evidence "which would tend to connect [petitioner] in any manner with any subversive group." (Appendix, Pet. Writ. Cert., 12, 39)

(b) The Attorney General alleges, at page 3 of his brief (in the Summary of Argument), that petitioner did not

---

[58] See, *e.g.*, R. 299-301, 439-440; 170-171; 181-182; 291-293. The character committee minority correctly reports, "The actual, limited extent of applicant's refusal to answer [certain questions] should be made clear. Applicant has answered fully all questions, including those concerning his political beliefs, except only such questions as were of such a specific nature and intent as—in the very answering—necessarily to reveal adherence or non-adherence to or membership or non-membership in a particular, identifiable organized political or religious group." Appendix, Pet. Writ. Cert., 30. See, also, Note 39, Brief on the Merits.

"make timely assertion of [the] contention [of denial of equal protection of the laws] in accordance with Illinois principles of practice, which principles are themselves constitutional." But he does not (in the Argument itself) say anything more about this allegation; nor does he try to explain away the timely assertions made by petitioner at pages 485 (nl), 29, 85, 146, 161, 335 and 353 of the Record as well as in the briefs filed in the court below.

(c) The Attorney General claims that petitioner "volunteered *ex gratia*" his views on when it might be proper to resist court decrees and advise others to do so, adding (at page 34) that petitioner

> did not delimit the circumstance that might impel or dispose him to advise violence as a justifiable means of avoiding the effect of the orders of courts of whom [*sic*] he hopes to be officers [*sic*].[59]

But, of course, the record shows petitioner engaging in these discussions only upon the insistence of the committee; it also shows him carefully delimiting the circumstances when resistance to constitutional usurpation (by any branch of the government) would be not only the right but even the duty of the responsible citizen (R. 87-88, 161-164, 165-167, 211-216, 217-220, 347-348).[60]

(d) "Petitioner," we are told, "does not even yet give a sensible reason why he will not answer the questions involved in this case." (Att'y Gen'l, 34) A weary petitioner can only reply that he has tried. He must refer both the

---

[59] Petitioner notes in passing the observation, "volunteered *ex gratia*" by the Attorney General, that petitioner's essays are "dull and very poorly written" (Att'y Gen'l, 30n).

[60] Petitioner consented to answer committee questions about his views on the right of revolution, after having had overruled his objections to such inquiry. R. 87-88, 131-132, 145-147, 156-157, 164-167, 207-220, 250-251, 325, 333, 341-342, 348, 421, 431. See Brief on the Merits, Note 18.

Attorney General and this Court to his Closing Argument for a comprehensive statement of his position.[61] It is appropriate here to stress again one of the principal reasons why petitioner has taken the position he has, his concern for the quality and integrity of the bar of his state and country.

7. On due process and the overwhelming proof of good character.

There remains for consideration the negative answer advanced by the Attorney General to the question he sets forth at page 33 of his brief:

> Even though the record may *permit* a finding of petitioner's fitness to practice law, does the evidence so imperiously *compel* such a finding as to render the contrary declaration of a majority of Illinois' Supreme Court a denial of due process? [Italics his.]

---

[61] R. 314-365. This Argument and the 1958 majority and minority reports of the character committee are reproduced in Numbers 4 and 2 of Volume 19 of The Lawyers Guild Review. "Sensible reasons" may also be found, among other places, in the opinions of this Court in *Garland* (4 Wall. 333), *Barnette* (319 U.S. 624), and *Konigsberg* (353 U.S. 252). See, also, Note 69, Brief on the Merits; *Syrek* v. *California Unemployment Insurance Appeals Board*, 354 P. 2d 625.

Of course, individual temperament (*i.e.*, nature) plays a part in determining whether "sensible reasons" are acted upon. See, *e.g.*, "The Strange Case of Sir William Fox," 24 New Zealand Law Journal 231 (R. 353-356); R. 232, 360, 365. See, also, Cicero, *De Officiis*, Book I, Cap. xxxi, xxxii-xxxiii; Note 56, Brief on the Merits (*cf.* Cicero, *Brutus*, Cap. 31, 73; Plato, *Republic*, 496D-497A); Shakespeare, *Coriolanus*, II, i, 186-187, 221; ii, 140-153; iii, 262-271; III, i, 38-41, 81, 254-261; ii, 39-45, 110-123; iii, 119-134; V, iii, 182-185. Petitioner closed his 1959 brief in the court below with the observation, "I hope this Court can see its way clear to uphold publicly those old-fashioned American principles that it has been my duty, pleasure and good fortune to support and defend."

See, finally, Aeschylus, *Prometheus Bound*, 380-387.

Petitioner submits that a due respect for the rule of law and for the rules of logic requires an affirmative answer to this question.

This is a proceeding in which the bar committee is required by law to pass on an applicant's character and fitness. Thus, Rule 58, Rules of Practice and Procedures of the Supreme Court of Illinois, provides,

> If the Committee is of the opinion that the applicant is of approved character and moral fitness, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar.

Compare the Attorney General's offhand amendment of this Rule, at page 5 of his brief,

> No amount of proof, however overwhelming, of petitioner's good character will suffice as a substitute for petitioner's personal and direct answers to these questions [as to his possible membership in or affiliation with subversive organizations].[62]

It is generally acknowledged that the court below has extensive powers over admission to the bar. But that court publicly advised bar applicants how it proposed to exercise those powers when it promulgated Rule 58. This rule contains no reference to the kinds of tests, "presumptions" and "notices" the Attorney General has attempted to read into it. The Illinois bar authorities are obliged to abide by their own rules and procedures, pursuant to which an overwhelming case has been made on behalf of petitioner's character and fitness. *Service* v. *Dulles*, 354 U.S. 363. Certainly, this Court should not be asked to

---

[62] This is true, the Attorney General argues (at page 18), even if "the amount of evidence of petitioner's good character" (without direct answers as to affiliations) should be "overwhelming and wholly uncontradicted." (For Rule 58, see Brief on the Merits, 7-8.)

ignore the responsibility it has recognized in the *Summers*, *Konigsberg* and *Schware* cases.[63]

The Attorney General has referred to the non-Communist oath required by statute of state employees in Illinois (Att'y Gen'l, 23-25); a member of the character committee referred to the non-Communist oath required by the Illinois Bar Association of its members (R. 303). One sees here two instances in which the state and the bar *have* changed the rules to make an explicit disavowal of Communist Party membership one of the conditions for "admission." In the absence of similar provisions in the rules and statutes bearing upon bar admissions, the traditional non-political meaning of terms such as "character and moral fitness" governs.[64]

---

[63] The reluctance of this Court to review a jury's unanimous judgment upon the evidence is well known. This situation is not comparable. One-third of the character committee voted for petitioner; the other two-thirds did not rely on a different assessment of the evidence but rather advanced technical arguments for ignoring that evidence. Upon the validity of those arguments an appellate tribunal is in at least as good a position as the "trial" tribunal to pass. In fact, the Attorney General himself points out, "The general rule that the findings of a lower tribunal will not be disturbed if they are supported by substantial evidence does not apply to matters affecting the right to practice law." (Att'y Gen'l, 17n (italics omitted)).

Finally the Secretary of the Chicago Bar Association closed an address at the June Annual Meeting of that organization with the observation, "I venture to predict, and I sincerely hope, that our Court will be reversed in the *Anastaplo* case. Justifiable pride in the performance of our Court permits the desire to see it redeemed from occasional error." Trumbull (R. 389-390, 319), "Observations on Recent Illinois Supreme Court Decisions," 42 Chicago Bar Record 57, 62 (November 1960).

[64] See Note 46, Brief on the Merits. Petitioner knows of no action taken in Illinois to disbar lawyers who advocate the constitutional position petitioner has defended. *In re Holland*, 377 Ill. 346, 36 N.E. 2d 543, seems to discourage such disbarment. See, also, *Sheiner* v. *State*, 82 So. 2d 657 (Fla.).

(Footnote continued on page 39)

All these considerations are reinforced by the confession of the Attorney General that the case against petitioner is founded upon a young man's adoption ten years ago of the very language of the Declaration of Independence.[65]

Conclusion

A higher public interest in a responsible and independent bar overrides the purely personal interest of petitioner in a respectable career and of the Illinois bar authorities

---

(Footnote 64 continued)

There is not in Illinois any rule or statute prescribing political or "loyalty" tests for admission to the bar of the kind found in some states and described in Brown and Fassett, "Loyalty Tests for Admission to the Bar," 20 Univ. Chicago L. Rev. 480 (1953). Petitioner's matter is discussed at pages 482, 492, 501-502. Note 80 of the article, which seems to employ the term "gratuitous" where "candid" would be more appropriate, suggests arguments which are dealt with at pages 12-17 and in Note 23 of this Brief.)

[65] See pages 12-17, this Reply Brief. It is appropriate to remind ourselves of the statutory oath which attorneys and counsellors of the courts of the United States successfully resisted almost a century ago (*Ex parte Garland*, 4 Wall. 333, at 334-335): "I, A.B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God."

(Footnote continued on page 40)

in formal vindication. For, as it has been said,[66] the issues of this case "involve nothing less than a definition of the desired moral character of the American bar . . . "

If petitioner has contributed anything to the definition of that character, the credit in good measure belongs to his Committee on Character and Fitness and to the Supreme Court of Illinois. He could not have accomplished the little he has done but for the willingness of those tribunals to provide a full day in court to an applicant with

---

(Footnote 65 continued)

The much more dignified oath, which the Act of Congress had attempted to replace, read, "I, A. B., do solemnly swear (or affirm, as the case may be) that I will demean myself as an attorney and counsellor of this court, uprightly, and according to law, and that I will support the Constitution of the United States." (4 Wall., at 336). The present Illinois oath for attorneys is printed at page 8 of the Brief on the Merits.

The problem of dignity is much more serious today than is generally recognized. See R. 353-356, 357-362. It is appropriate to repeat here the apology with which petitioner opened his Closing Argument before the character committee (R. 314), "I hope that what I have to say is significant enough to compensate for my inadequacies as an advocate . . . and to compensate as well for the unedifying and inevitably falsifying spectacle of having to talk so much about oneself."

[66] Brief of American Civil Liberties Union, *Amicus Curiae* (Professors Harry Kalven, Jr. and Roscoe T. Steffen, The University of Chicago Law School, Counsel), p. 2. The brief concludes (pp. 25-26), "And we respectfully ask the Court to reverse the judgment below. In so doing, the Court will not only do justice in this case, but it will be vividly reaffirming for generations of applicants to come, the high place that candor, courage, and independence of mind have as attributes of that character and fitness which make the lawyer."

On the constancy of petitioner's position, see Commissioner Rothschild's assessment, "The petition for rehearing contains nothing substantial that was not expressed in the original hearings, 6 or 7 years prior to *Konigsberg* and *Yates*." Appendix, Pet. Writ. Cert., 5n.

remarkably little support among the lawyers and law teachers of his state.[67]

Petitioner is grateful to the court below and its character committee for that which they *have* done. The Illinois bar authorities should, in turn, be grateful if induced by this Court to go even further than they have been able to make themselves go toward the realization of that justice which is the only true foundation of the security for which they seek.

Respectfully submitted,

GEORGE ANASTAPLO, *Petitioner*
Counsel pro se.
6030 Ellis Avenue
Chicago 37, Illinois
DOrchester 3-4825

Carterville, Illinois
November 24, 1960

---

[67] Professor Malcolm P. Sharp, of the University of Chicago Law School, observed in a letter of March 26, 1951, to petitioner (R. 479), "Though I began, as you will remember, by disagreeing with the position which you were taking before the Committee, and urging you to abandon it, I have respected it from the outset. Indeed, as I said to you before you went abroad, I am almost convinced that it is a position which people ought to take in similar cases. I think I am the only member of the faculty who feels that way, but one of my colleagues said lately that he understood now better than formerly what you were driving at. Your problem is closely related to the problem of the oath, and eminent and conservative lawyers are among the minority in the American Bar Association who have emphatically opposed the Association's position in advocating a loyalty oath for lawyers. . . ." See Sharp, "The Old Constitution," 20 Univ. Chicago L. Review 529, 541-4 (1953). See, also, R. 319,356, 357; Note 66, this Brief. *Cf.* Cicero, *De Officiis*, Book III, Cap. xxxi (. . . *itaque laus non est hominis, sed temporum.*).

SUPREME COURT OF THE UNITED STATES

No. 58.—October Term, 1960.

In re George Anastaplo, Petitioner. | On Writ of Certiorari to the Supreme Court of Illinois.

[April 24, 1961.]

Mr. Justice Harlan delivered the opinion of the Court.

The questions presented by this case are similar to those involved in No. 28, *Konigsberg* v. *State Bar of California*, decided today. *Ante*, p. —.

In 1954 petitioner, George Anastaplo, an instructor and research assistant at the University of Chicago, having previously passed his Illinois bar examinations, was denied admission to the bar of that State by the Illinois Supreme Court.[1] The denial was based upon his refusal to answer questions of the Committee on Character and Fitness as

[1] The Illinois procedure for admission to the bar was thus summarized by the State Supreme Court (3 Ill. 2d, at 475–476):

"In the exercise of its judicial power over the bar, and in discharge of its responsibility for the choice of personnel who will compose that bar, this court has adopted Rule 58, (Ill. Rev. Stat. 1951, chap. 110, par. 259.58,) which governs admissions and provides, among other things, that applicants shall be admitted to the practice of law by this court after satisfactory examination by the Board of Examiners and certification of approval by a Committee on Character and Fitness. Section IX of the rule provides for the creation of such committees and imposes upon them the duty to examine applicants who appear before them for moral character, general fitness to practice law and good citizenship. Still another condition precedent to admission to practice law in this State, imposed by the legislature, is the taking of an oath to support the constitution of the United States and the constitution of the State of Illinois. (Ill. Rev. Stat. 1951, chap. 13, par. 4.)"

to whether he was a member of the Communist Party. This Court, two Justices dissenting, refused review. 348 U. S. 946. In 1957, following this Court's decisions in the earlier *Konigsberg* case, 353 U. S. 252, and in *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U. S. 232, Anastaplo sought to have the Character Committee rehear his application for certification. The Committee, by a divided vote, refused, but the State Supreme Court reversed and directed rehearing.[3]

---

[2] On that occasion the State Supreme Court said (3 Ill. 2d, at 480):

"It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate."

[3] In remanding the matter to the Character Committee, the Illinois Supreme Court stated (see 18 Ill. 2d, at 186):

"'The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California*, 353 U. S. 252, and *Yates* v. *United States*, 1 L. ed. 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation.

"'We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions.'"

The ensuing lengthy proceedings before the Committee,[4] at which Anastaplo was the only witness, are perhaps best described as a wide-ranging exchange between the Committee and Anastaplo in which the Committee sought to explore Anastaplo's ability conscientiously to swear support of the Federal and State Constitutions, as required by the Illinois attorneys' oath, and Anastaplo undertook to expound and defend, on historical and ideological premises, his abstract belief in the "right of revolution," and to resist, on grounds of asserted constitutional right and scruple, Committee questions which he deemed improper.[5] The Committee already had before it uncontroverted evidence as to Anastaplo's "good moral character," in the form of written statements or affidavits furnished by persons of standing acquainted with him, and the record on rehearing contains nothing which could properly be considered as reflecting adversely upon his character or reputation or on the sincerity of the beliefs

---

[4] The proceedings consumed six hearing days, and resulted in a transcript of over 400 pages.

[5] More particularly: petitioner was first asked routine questions about his personal history. He refused, on constitutional grounds, to answer whether he was affiliated with any church. He answered all questions about organizational relationships so long as he did not know that the organization was "political" in character. He refused, on grounds of protected free speech and association, to answer whether he was a member of the Communist Party or of any other group named in the Attorney General's list of "subversive" organizations, including the Ku Klux Klan and the Silver Shirts of America.

Much of the ensuing five sessions was devoted to discussion of Anastaplo's reasons for believing that inquiries into such matters were constitutionally privileged, and to an unjustifiable attempt, later expressly repudiated by the Committee, to delve into the consistency of petitioner's religious beliefs with an attorney's duty to take an oath of office.

A substantial part of the proceedings revolved around Anastaplo's views as to the right to revolt against tyrannical government, and the right to resist judicial decrees in exceptional circumstances.

he espoused before the Committee.[6] Anastaplo persisted, however, in refusing to answer, among other inquiries, the Committee's questions as to his possible membership in the Communist Party or in other allegedly related organizations.

Thereafter the Committee, by a vote of 11 to 6, again declined to certify Anastaplo because of his refusal to answer such questions, the majority stating in its report to the Illinois Supreme Court:

> "his [Anastaplo's] failure to reply, in our view, (i) obstructs the lawful processes of the Committee, (ii) prevents inquiry into subjects which bear intimately upon the issue of character and fitness, such as loyalty to our basic institutions, belief in representative government and *bona fides* of the attorney's oath and (iii) results in his failure to meet the burden of establishing that he possesses the good moral character and fitness to practice law, which are conditions to the granting of a license to practice law.
>
> "We draw no inference of disloyalty or subversion from applicant's continued refusal to answer questions concerning Communist or other subversive affiliations. We do, however, hold that there is a strong public interest in our being free to question applicants for admission to the bar on their adherence to our basic institutions and form of government and that such public interest in the character of its attorneys overrides an applicant's private interest in keeping such views to himself. By failing to respond to this higher public interest we hold that the appli-

[6] Although the transcript of the prior Committee proceedings has not been made part of the record before us, it is evident that it contained nothing which affirmatively reflected unfavorably on petitioner's character or reputation.

[7] See note 5, *supra*.

> cant has obstructed the proper functions of the Committee . . . . We cannot certify the applicant as worthy of the trust and confidence of the public when we do not know that he is so worthy and when he has prevented us from finding out."

At the same time the full Committee acknowledged that Anastaplo

> "is well regarded by his academic associates, by professors who had taught him in school and by members of the Bar who know him personally . . . ."

that it had

> "not been furnished with any information by any third party which is derogatory to Anastaplo's character or general reputation . . . ."

and that it had

> "received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group."

Further, the majority found that Anastaplo's views

> "with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines."

Upon review, the Illinois Supreme Court, over three dissents,* confirmed the Committee's report and refusal to

* Two dissenting opinions were filed. Justice Bristow dissented on constitutional grounds. 18 Ill. 2d 201. Justices Schaefer and Davis, joining in a single opinion, did not reach the constitutional questions. *Id.*, at 224.

certify Anastaplo, reaffirming in its *per curiam* opinion the court's

> ". . . earlier conclusion that a determination as to whether an applicant can in good conscience take the attorney's oath to support and defend the constitutions of the United States and the State of Illinois is impossible where he refuses to state whether he is a member of a group dedicated to the overthrow of the government of the United States by force and violence." 18 Ill. 2d 182, 200–201.

We granted certiorari, 362 U. S. 968, and set the matter for argument along with the *Konigsberg* case and No. —, *Cohen* v. *Hurley*, *post*, p. —.

Two of the basic issues in this litigation have been settled by our contemporary *Konigsberg* opinion. We have there held it not constitutionally impermissible for a State legislatively, or through court-made regulation as here and in *Konigsberg*, to adopt a rule that an applicant will not be admitted to the practice of law if, and so long as, by refusing to answer material questions, he obstructs a bar examining committee in its proper functions of interrogating and cross-examining him upon his qualifications. That such was a proper function of the Illinois Character Committee is incontestably established by the opinions of the State Supreme Court in this case. 3 Ill. 2d, at 476; 18 Ill. 2d, at 188.[9]

[9] In its second opinion, the State Supreme Court stated (18 Ill. 2d, at 188):

"The Committee further advises us that it has conducted no independent investigation into Anastaplo's character, reputation or activities. For the very practical reason that the committee has no personnel or other resources for any such investigation, the committee states that it has traditionally asserted the view that it cannot be expected to carry the burden of establishing by independent investigation, whether an applicant possesses the requisite character and fitness for admission to the bar and that a duty devolves upon the

We have also held in *Konigsberg* that the State's interest in enforcing such a rule as applied to refusals to answer questions about membership in the Communist Party outweighs any deterrent effect upon freedom of speech and association, and hence that such state action does not offend the Fourteenth Amendment.[10] We think that in this respect no valid constitutional distinction can be based on the circumstance that in *Konigsberg* there was some, though weak, independent evidence that the applicant had once been connected with the Communist Party, while here there was no such evidence as to Anastaplo. Where, as with membership in the bar, the State may withhold a privilege available only to those possessing the requisite qualifications, it is of no constitutional significance whether the State's interrogation of an applicant on matters relevant to these qualifications—in this case Communist Party membership—is prompted by information which it already has about him from other sources, or arises merely from a good faith belief in the need for exploratory or testing questioning of the applicant. Were it otherwise, a bar examining committee such as this, having no resources of its own for independent

---

applicant to establish that he possesses the necessary qualifications and that it is then the duty of the committee to test, by hearings and questioning of the applicant, the worth of the evidence which he proffers. We agree, and have held that the discretion exercised by the Committee on Character and Fitness will not ordinarily be reviewed. *In re Frank*, 293 Ill. 263."

[10] The fact that in *Konigsberg* the materiality of questions relating to Communist Party membership rested directly on the existence of a California statute disqualifying from membership in the bar those advocating forcible overthrow of government, whereas here materiality stemmed from their bearing upon the likelihood that a bar applicant would observe as a lawyer the orderly processes that lie at the roots of this country's legal and political systems, cf. *Barenblatt* v. *United States*, 360 U. S. 109, is of course a circumstance of no significance.

investigation, might be placed in the untenable position of having to certify an applicant without assurance as to a significant aspect of his qualifications which the applicant himself is best circumstanced to supply. The Constitution does not so unreasonably fetter the States.[11]

Two issues, however, do arise upon this record which are not disposed of by *Konigsberg*. The first is whether Anastaplo was given adequate warning as to the consequences of his refusal to answer the Committee's questions relating to Communist Party membership. The second is whether his exclusion from the bar on this ground was, in the circumstances of this case, arbitrary or discriminatory.

I.

The opinions below reflect full awareness on the part of the Character Committee and the Illinois Supreme Court of Anastaplo's constitutional right to be warned in advance of the consequences of his refusal to answer.[12] Cf. *Konigsberg* v. *State Bar*, 353 U. S., at 261. On the part of Anastaplo, he stands in the unusual position of one who had already been clearly so warned as a result of his earlier exclusion from the bar for refusal to answer the very question which was again put to him on rehearing.

---

[11] Cf. *Garner* v. *Los Angeles Board*, 341 U. S. 716; *American Communications Assn.* v. *Douds*, 339 U. S. 382.

[12] The Committee's majority report states:

"The Committee repeatedly warned the applicant that questions regarding Communist affiliation were viewed as important by the Committee members and that his failure to respond to them could adversely affect his application for admission to the bar."

The Illinois Supreme Court stated (18 Ill. 2d, at 196):

". . . . no problem exists as to inadequate notice of the consequences of a refusal to answer; the applicant was specifically notified both by the Illinois Supreme Court in its opinion in 3 Ill. 2d 471, and by the committee on rehearing that his continued refusal to answer might lead to the denial of his application."

See note 2, *supra*. Anastaplo nevertheless, contends in effect that he was lulled into a false sense of security by various occurrences at the Committee hearings: (1) several statements by Committee members indicating that all questions asked and refused an answer should not be considered as bearing the same level of importance in the eyes of the Committee; [13] and (2) a statement by one of the principal Committee members that Illinois had no "per se" rule of exclusion, that is that Anastaplo's refusal to answer would not *automatically* operate to exclude him from the bar.[14]

---

[13] It was stated at one point in the Committee hearings: "It has been pointed out before to you, that the mere fact that a question is asked does not indicate that other people would have asked or approved that question, nor does it indicate that any particular weight will be attached to the answer or failure to answer the question; do you understand." It should be observed, however, that this remark, as was also the case with an earlier similar remark, was made in the context of questions involving petitioner's religious beliefs. See note 3, *supra*.

[14] This aspect of Anastaplo's contention is based on the following episode relating to the Committee's Communist Party questions:

"Mr. Anastaplo: . . . I would like to find out exactly what this entails. You are not suggesting that refusal to answer that question would *per se* block my admission to the bar?

"Commissioner Stephan: No, I am saying your refusal to answer that question as to whether you are a member of the Communist Party, could and might.

"Mr. Anastaplo: I see.

"Commissioner Stephan: To us, it is relevant to your character and fitness. If you should answer the question 'yes,' I am not at all sure that would end the inquiry. I think if you should answer it 'yes,' the committee should be entitled to probe further and find out what kind of Communist Party member the applicant might be, whether he is an active member, whether he is a dues-paying member, whether he is a policy-making member, whether he is an officer in a local group, or just what he is. So I would point out the seriousness of that issue to you at this time.

"Mr. Anastaplo: I assume that the committee does not care to

These suggestions, whether taken separately or together, can only be viewed as insubstantial. The sum and substance of the matter is that throughout the renewed proceedings petitioner was fully aware that his application for admission had already once been rejected on the very ground about which he now professes to have been left in doubt, and that the Committee made manifest both that it continued to attach special importance to its Communist Party affiliation questions, and that adverse consequences might well follow if Anastaplo persisted in refusing to answer them.

What follows will suffice to show that statements to the effect that the Committee as a whole did not necessarily approve or adopt every question asked by any of its members can hardly be taken as having left petitioner in doubt as to the central importance and general approval of questions about Communist Party membership. At an early stage of the proceedings Anastaplo was informed.

> "Now you have asked for a warning when we put a question to you that we think is a pivotal, important question in connection with you qualification. I must tell you that we consider that question, 'Are

---

state why this is a particularly serious issue with respect to me? I mean—I notice you say nothing about the Ku Klux Klan or the Silver Shirts of America, about which you have also asked with the same amount of emphasis up to this point, and which I have refused to answer for the same reasons. Would you care to indicate why you say this about this question and not about the other ones?

"Commissioner Stephan: I think there is an easy answer to that. This committee has not come into being—this committee cannot completely ignore the history of this proceeding.

"Commissioner ————: But the history includes that question, and that question has been before two of the high courts of the country.

"Commissioner Stephan: Whatever the relevance of other questions, we consider that one quite relevant."

> you a member of the Communist Party,' such a question; and that the refusal to answer it may have serious consequences to your application."

And at the last hearing one of the leading Committee members responded to Anastaplo's insistence on being told even more explicitly what refusals to answer would be of significance to the Committee, by pointing out that

> "The Supreme Court of Illinois has ruled that it is proper for us to ask you whether you are a member of the Communist Party. You have refused to answer the question." [15]

Further, petitioner's repeated objections throughout the hearings to the effect that there was no basis for the Committee's evident purpose to give much greater emphasis to questions about Communist Party membership than to other unanswered inquiries, dispels any doubt but that Anastaplo was quite aware that Communist-affiliation questions were to be treated differently from other questions he had refused to answer.

The other aspect of petitioner's claim on lack of adequate warning is equally untenable. It is true that the Committee told Anastaplo that his refusal to answer questions would not *ipso facto* result in his exclusion from the bar, but only that it "could and might." This, however, certainly did not give rise to constitutional infirmity. Even as to one charged with crime due process does not demand that he be warned as to what specific sanction will be applied to him if he violates the law. It is enough

---

[15] The particular importance which the Committee attached to its Communist Party questions was still further brought home to Anastaplo by the fact that after this Court's decisions in *Beilan* v. *Board of Education*, 357 U. S. 399 and *Lerner* v. *Casey*, 357 U. S. 468 had come down, the Committee wrote Anastaplo specifically drawing his attention to them.

that he know what sanction "could and might" be visited on him. Anastaplo was entitled to no more. It is of course indubitable that by reason of the original rejection of his application, Anastaplo knew of Illinois' rule of exclusion for refusal to answer relevant questions—indeed the very questions involved here.[16]

Petitioner having been fairly warned that exclusion from admission to practice might follow from his refusal to answer, it must be found that this requirement of due process was duly met.

II.

Petitioner's claim that the application of the State's exclusionary rule was arbitrary and discriminatory in the circumstances of this case must also be rejected. It is contended (1) that Anastaplo's refusal to answer these particular questions did not obstruct the Committee's investigation, because that body already had before it uncontroverted evidence establishing petitioner's good character and fitness for the practice of law; and (2) that the real reason why the State proceeded as it did was because of its disapproval of Anastaplo's constitutionally protected views on the right to resist tyrannical government. Neither contention can be accepted.

It is sufficient to say in answer to the first contention that even though the Committee already had before it

[16] We find it difficult to understand how it can be seriously suggested, as it further is, that petitioner was put off guard by the fact that instead of standing on petitioner's mere refusal to answer such questions, the Committee proceeded to interrogate him widely. Not only are subsequent events generally irrelevant to an earlier warning, but a large part of the questioning which Anastaplo now complains led him astray was in fact devoted to exploring the bearing of these questions on his fitness for admission to the bar and his reasons for declining to answer them.

substantial character evidence altogether favorable to Anastaplo, there is nothing in the Federal Constitution which required the Committee to draw the curtain upon its investigation at that point. It had the right to supplement that evidence and to test the applicant's own credibility by interrogating him. And to those ends the Committee could insist upon unprivileged answers to relevant questions, such as we have held in our today's *Konigsberg* opinion those relating to Communist affiliations were, even though as to them the Committee could not, as it did not, draw an unfavorable inference from refusal to answer. *Konigsberg v. State Bar of California, supra.*

As to the second contention, there is nothing in the record which would justify our holding that the State has invoked its exclusionary refusal-to-answer rule as a mask for its disapproval of petitioner's notions on the right to overthrow tyrannical government.[17] While the Committee's majority report does observe that there was "a serious question" whether Anastaplo's views on the right to resist judicial decrees would be compatible with his taking of the attorney's oath, and that "certain" members of the Committee thought that such views affirmatively demonstrated his disqualification for admission to the bar,[18] it is perfectly clear that the Illinois Bar Com-

---

[17] Both the Committee's report and the State Supreme Court's opinion make it apparent that this area of Anastaplo's views played no part in his exclusion from the bar. See p. —, *supra*; 18 Ill. 2d, at 188.

[18] This of course could hardly be so in the context of the illustrations which Anastaplo gave of his views as to when a right to resist might arise. These were: Nazi Germany; Hungary during the 1956 revolt against Russia; a hypothetical decree of this Court establishing "some dead pagan religion as the official religion of the country . . . ;" a capital sentence of Jesus Christ. Asked to give a more realistic instance of when resistance would be proper, Anastaplo summarized: "I know of no decree, off hand, in the history

mittee and Supreme Court regarded petitioner's refusal to cooperate in the Committee's examination of him as the basic and only reason for a denial of certification.[19]

A different conclusion is not suggested by the circumstances that the Committee when it reheard Anastaplo evinced its willingness to consider the effect of petitioner's refusal to answer in light of what might transpire at the hearings, and that it continued to explore petitioner's views on resistance and overthrow long after it became clear that he would refuse to answer Communist affiliation questions. These factors indicate no more than that the Committee was attempting to exercise an informed judgment as to whether the situation was an appropriate one for waiver of the Committee's continuing requirement, earlier enforced after the first Anastaplo hearings, that such questions must be answered. Finally, contrary to the assumption on which some of the arguments on behalf of Anastaplo seem to have proceeded, we do not understand that Illinois' exclusionary requirement will continue to operate to exclude Anastaplo from the bar any longer than he continues in his refusal to answer. We find nothing to suggest that he would not be admitted now if he decides to answer, assuming of course that no grounds justifying his exclusion from practice resulted. In short, petitioner holds the key to admission in his own hands.

We conclude with observing that our function here is solely one of constitutional adjudication, not to pass judgment on what has been done as if we were another state

---

of American government, where such a single instance has occurred. No—I grant that it is hard to find these instances. I think it is important to insist that there might be such instances." Nothing in the State Court's opinion remotely suggests its approbation of these views of "certain" Committee members.

[19] *Supra*, p. —.

court of review, still less to express any view upon the wisdom of the State's action. With appropriate regard for the limited range of our authority we cannot say that the State's denial of Anastaplo's application for admission to its bar offends the Federal Constitution.[20] The judgment of the Illinois Supreme Court must therefore be

Affirmed.

[20] Apart from anything else, there is of course no room under our Rules for the suggestion made in petitioner's brief that he be admitted to the Bar of this Court, "independently of the action Illinois might be induced to take." See Rule 5, Revised Rules of this Court.

SUPREME COURT OF THE UNITED STATES

No. 58.—October Term, 1960.

In re George Anastaplo, Petitioner. | On Writ of Certiorari to the Supreme Court of Illinois.

[April 24, 1961.]

Mr. Justice Black, with whom The Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan concur, dissenting.

The petitioner George Anastaplo has been denied the right to practice law in the State of Illinois for refusing to answer questions about his views and associations. I think this action by the State violated rights guaranteed to him by the First and Fourteenth Amendments. The reasons which lead me to this conclusion are largely the same as those expressed in my dissenting opinion in *Konigsberg* v. *State Bar of California*, the companion case decided today. But this case provides such a striking illustration of the destruction that can be inflicted upon individual liberty when this Court fails to enforce the First Amendment to the full extent of its express and unequivocal terms that I think it deserves separate treatment.

The controversy began in November 1950,[1] when Anastaplo, a student at the University of Chicago Law School, having two months previously successfully passed the Illinois Bar examination, appeared before the State's Committee on Character and Fitness for the usual inter-

[1] As the majority points out, the record in the first series of hearings, which culminated in a denial of certiorari by this Court (348 U. S. 946), is not a part of the record in this case but we take judicial notice of it. *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 336, and cases cited there.

view preliminary to admission to the Bar. The personal history form required by state law had been filled out and filed with the Committee prior to his appearance and showed that Anastaplo was an unusually worthy applicant for admission. His early life had been spent in a small town in southern Illinois where his parents, who had immigrated to this country from Greece before his birth, still resided. After having received his precollege education in the public schools of his home town, he had discontinued his education, at the age of eighteen, and joined the Air Force during the middle of World War II—flying as a navigator in every major theater of the military operations of that war. Upon receiving an honorable discharge in 1947, he had come to Chicago and resumed his education, obtaining his undergraduate degree at the University of Chicago and entering immediately into the study of law at the University of Chicago Law School. His record throughout his life, both as a student and as a citizen, was unblemished.

The personal history form thus did not contain so much as one statement of *fact* about Anastaplo's past life or conduct that could have, in any way, cast doubt upon his fitness for admission to the Bar. It did, however, contain a statement of *opinion* which, in the minds of some of the members of the Committee at least, did cast such doubt and in that way served to touch off this controversy. This was a statement made by Anastaplo in response to the command of the personal history form: "State what you consider to be the principles underlying (a) the Constitution of the United States." Anastaplo's response to that command was as follows:

> "One principle consists of the doctrine of the separation of powers; thus, among the Executive, Legislative, and Judiciary are distributed various functions and powers in a manner designed to provide for a balance of power, thereby intending to prevent totally

unrestrained action by any one branch of government. Another basic principle (and the most important) is that such government is constituted so as to secure certain inalienable rights, those rights of Life, Liberty and the Pursuit of Happiness (and elements of these rights are explicitly set forth in such parts of the Constitution as the Bill of Rights.). *And, of course, whenever the particular government in power becomes destructive of these ends, it is the right of the people to alter or to abolish it and thereupon to establish a new government.* This is how I view the Constitution." (Emphasis supplied.)

When Anastaplo appeared before a two-man Subcommittee of the Committee on Character and Fitness, one of its members almost immediately engaged him in a discussion relating to the meaning of these italicized words which were substantially taken from that part of the Declaration of Independence set out below.[2] This discussion soon developed into an argument as Anastaplo stood by his statement and insisted that if a government gets bad enough, the people have a "right of revolution." It was at this juncture in the proceedings that the other member of the Subcommittee interrupted with the question: "Are you a member of any organization that is listed on the Attorney General's list, to your knowledge?" And this question was followed up a few

---

[2] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

moments later with the question: "Are you a member of the Communist Party?" [3] A colloquy then ensued between Anastaplo and the two members of the Subcommittee as to the legitimacy of the questions being asked,

[3] The following excerpt from the record of the first hearing indicates clearly the connection between Anastaplo's views on the "right of revolution" and the questions subsequently asked him about his "possible" political associations:

"Commissioner MITCHELL: When you say 'believe in revolution,' you don't limit that revolution to an overthrow of a particular political party or a political government by means of an election process or other political means?

"Mr. ANASTAPLO: I mean actual use of force.

"Commissioner MITCHELL: You mean to go as far as necessary?

"Mr. ANASTAPLO: As far as Washington did, for instance.

"Commissioner MITCHELL: So that would it be fair to say that you believe the end result would justify any means that were used?

"Mr. ANASTAPLO: No, the means proportionate to the particular end in sight.

"Commissioner MITCHELL: Well, is there any difference from your answer and my question?

"Mr. ANASTAPLO: Did you ask—

"Commissioner MITCHELL: I asked you whether you thought that you believe that if a change, or overthrow of the government were justified, that any means could be used to accomplish that end.

"Mr. ANASTAPLO: Now, let's say in this positive concrete situation—I am not quite sure what it means in abstract.

"Commissioner MITCHELL: I will ask you in detail. You believe that assuming the government should be overthrown, in your opinion, that you and others of like mind would be justified in raising a company of men with military equipment and proceed to take over the government of the United States, of the State of Illinois?

"By shaking your head do you mean yes?

"Mr. ANASTAPLO: If you get to the point where overthrow is necessary, then overthrow is justified. It just means that you overthrow the government by force.

"Commissioner MITCHELL: And would that also include in your mind justification for putting a spy into the administrative department, one or another of the administrative departments of the United States or the government of the State of Illinois?

[*Footnote 3 continued on p. 5.*]

Anastaplo insisting that these questions were not reasonably related to the Committee's functions and that they violated his rights under the Constitution, and the members of the Subcommittee insisting that the questions were entirely legitimate.

The Subcommittee then refused to certify Anastaplo for admission to the Bar but, instead, set a further hearing on the matter before the full Committee. That next hearing, as well as all of the hearings that followed, have been little more than repetitions of the first. The rift between Anastaplo and the Committee has grown ever wider with each successive hearing. Anastaplo has steadfastly refused to answer any questions put by the Committee which inquired into his political associations or religious beliefs. A majority of the members of the

---

"Mr. ANASTAPLO: If you got to the point you think the government should be overthrown, I think that would be a legitimate means.

"Commissioner MITCHELL: There isn't any difference in your mind in the propriety of using a gun or using a spy?

"Mr. ANASTAPLO: I think spies have been used in quite honorable causes.

"Commissioner MITCHELL: Your answer is, you do think so?

"Mr. ANASTAPLO: Yes.

"Commissioner BAKER: Let me ask you a question. Are you aware of the fact that the Department of Justice has a list of what are described as subversive organizations?

"Mr. ANASTAPLO: Yes.

"Commissioner BAKER: Have you ever seen that list?

"Mr. ANASTAPLO: Yes.

"Commissioner BAKER: Are you a member of any organization that is listed on the Attorney General's list, to your knowledge? (No answer.) Just to keep you from having to work so hard mentally on it, what organizations—give me all the organizations you are affiliated with or are a member of. (No answer.) That oughtn't to be too hard.

"Mr. ANASTAPLO: Do you believe that is a legitimate question?

"Commissioner BAKER: Yes, I do. We are inquiring into not only your character, but your fitness, under Rule 58. We don't compel you to answer it. Are you a member of the Communist Party?"

Committee, faced with this refusal, has grown more and more insistent that it has the right to force him to answer any question it sees fit to ask. The result has been a series of hearings in which questions have been put to Anastaplo with regard to his "possible" association with scores of organizations, including the Ku Klux Klan, the Silver Shirts (an allegedly Fascist organization), every organization on the so-called Attorney General's list, the Democratic Party, the Republican Party, and the Communist Party. At one point in the proceedings, at least two of the members of the Committee insisted that he tell the Committee whether he believes in a Supreme Being and one of these members stated that, as far as his vote was concerned, a man's "belief in the Deity . . . has a substantial bearing upon his fitness to practice law."

It is true, as the majority points out, that the Committee did not expressly rest its refusal to certify Anastaplo for admission to the Bar either upon his views on the "right of revolution," as that "right" is defined in the Declaration of Independence, or upon his refusal to disclose his beliefs with regard to the existence of God,[4] or upon his refusals to disclose any of his political associations other than his "possible" association with the Communist Party. But it certainly cannot be denied that the other questions were asked and, since we should not presume that these members of the Committee

[4] As the majority points out, the Committee eventually did expressly disavow any right to insist upon an answer to this question. This came at the end of a long disagreement between Anastaplo and certain members of the Committee with respect to the vitality of an old Illinois decision which indicated that a belief in God might be necessary in order to take an oath to testify. The Committee's abandonment of the point came only after Anastaplo produced a more recent Illinois case disapproving the earlier decision. It is interesting to note that neither of the Committee members who had expressed such a strong interest in knowing whether Anastaplo believes in God voted in favor of his certification.

did not want answers to their questions, it seems certain that Anastaplo's refusal to answer them must have had some influence upon the final outcome of the hearings. In any case, when the Committee did vote, 11–6, not to certify Anastaplo for admission, not one member who asked *any* question Anastaplo had refused to answer voted in his favor.

The reasons for Anastaplo's position have been stated by him time and again—first, to the Committee and, later, in the briefs and oral arguments he presented in his own behalf, both before this Court and before the Supreme Court of Illinois. From a legal standpoint, his position throughout has been that the First Amendment gave him a right not to disclose his political associations or his religious beliefs to the Committee. But his decision to refuse to disclose these associations and beliefs went much deeper than a bare reliance upon what he considered to be his legal rights. The record shows that his refusal to answer the Committee's question stemmed primarily from his belief that he had a duty, both to society and to the legal profession, not to submit to the demands of the Committee because he believed that the questions had been asked solely for the purpose of harassing him because he had expressed agreement with the assertion of the right of revolution against an evil government set out in the Declaration of Independence. His position was perhaps best stated before the Committee in his closing remarks at the final session:

> "It is time now to close. Differences between us remain. I leave to others the sometimes necessary but relatively easy task of praising Athens to Athenians. Besides, you should want no higher praise than what I have said about the contribution the bar can make to republican government. The bar deserves no higher praise until it makes that con-

tribution. You should be grateful that I have not made a complete submission to you, even though I have cooperated as fully as good conscience permits. To the extent I have not submitted, to that extent have I contributed to the solution of one of the most pressing problems that you, as men devoted to character and fitness, must face. This is the problem of selecting the standards and methods the bar must employ if it is to help preserve and nourish that idealism, that vital interest in the problem of justice. that so often lies at the heart of the intelligent and sensitive law student's choice of career. This is an idealism which so many things about the bar, and even about bar admission practices, discourage and make unfashionable to defend or retain. The worthiest men live where the rewards of virtue are greatest.

"I leave with you men of Illinois the suggestion that you do yourselves and the bar the honor, as well as the service, of anticipating what I trust will be the judgment of our most thoughtful judges. I move therefore that you recommend to the Supreme Court of Illinois that I be admitted to the bar of this State. And I suggest that this recommendation be made retroactive to November 10, 1950 when a young Air Force veteran first was so foolish as to continue to serve his country by daring to defend against a committee on character and fitness the teaching of the Declaration of Independence on the right of revolution."

The reasons for the Committee's position are also clear. Its job, throughout these proceedings, has been to determine whether Anastaplo is possessed of the necessary good moral character to justify his admission to the Bar of Illinois. In that regard, the Com-

mittee has been given the benefit of voluminous affidavits from men of standing in their professions and in the community that Anastaplo is possessed of an unusually fine character. Dr. Alexander Meiklejohn, Professor of Philosophy, Emeritus, at the University of Wisconsin, for example, described Anastaplo as "intellectually able, a hard, thorough student and moved by high devotion to the principles of freedom and justice." Professor Malcolm P. Sharp of the University of Chicago Law School stated: "No question has ever been raised about his honesty or his integrity, and his general conduct, characterized by friendliness, quiet independence, industry and courage, is reflected in his reputation." Professor Roscoe T. Steffen of the University of Chicago Law School said: "I know of no one who doubts his honesty and integrity." Yves R. Simon, Professor of Philosophy at the University of Chicago, said: "I consider Anastaplo as a young man of the most distinguished and lofty moral character. Everybody respects him and likes him." Angelo G. Geocaris, a practicing attorney in the City of Chicago, said of Anastaplo: "His personal code of ethics is unexcelled by any practicing attorney I have met in the state of Illinois." Robert J. Coughlan, Division Director of a research project at the University of Chicago, said: "His honesty and integrity are, in my opinion, beyond question. I would highly recommend him without the slightest reservation for any position involving the highest or most sacred trust. The applicant is a rare man among us today; he has an inviolable sense of Honor in the great traditions of Greek culture and thought. If admitted to the American Bar, he could do nothing that would not reflect glory on that institution."

These affidavits and many more like them were presented to the Committee. Most of the statements came from men who knew Anastaplo intimately on the Uni-

versity of Chicago campus where Anastaplo has remained throughout the proceedings here involved, working as a research assistant and as a lecturer in Liberal Arts and studying for an advanced degree in History and Social Sciences. Even at the present time, he is still there preparing his doctoral dissertation which, understandably enough, is tentatively entitled "The Historical and Philosophical Background of the First Amendment of the Constitution of the United States."

The record also shows that the Committee supplemented the information it had obtained about Anastaplo from these affidavits by conducting informal independent investigations into his character and reputation. It sent agents to Anastaplo's home town in southern Illinois and they questioned the people who knew him there. Similar inquiries were made among those who knew him in Chicago. But these intensive investigations apparently [5] failed to produce so much as one man in Chicago or in the whole State of Illinois who could say or would say, directly, indirectly or even by hearsay, one thing derogatory to the character, loyalty or reputation of George Anastaplo, and not one man could be found who would in any way link him with the Communist Party. This fact is particularly significant in view of the evidence in the record that the Committee had become acquainted with a person who apparently had been a member of a Communist Party cell on the University of Chicago campus and that this person was asked to and did identify for the Committee every member of the Party whom he knew.

---

[5] The record shows that although Anastaplo repeatedly requested that the Committee allow him to see any reports that resulted from these independent investigations, the Committee, without denying that such reports existed, refused to produce them.

In addition to the information it had obtained from the affidavits and from its independent investigations, the Committee had one more important source of information about Anastaplo's character. It had the opportunity to observe the manner in which he conducted himself during the many hours of hearings before it. That manner, as revealed by the record before us and undenied by any findings of the Committee to the contrary, left absolutely nothing to be desired. Faced with a barrage of sometimes highly provocative and totally irrelevant questions from men openly hostile to his position, Anastaplo invariably responded with all the dignity and restraint attributed to him in the affidavits of his friends. Moreover, it is not amiss to say that he conducted himself in precisely the same manner during the oral argument he presented before this Court.

Thus, it is against the background of a mountain of evidence so favorable to Anastaplo that the word "overwhelming" seems inadequate to describe it that the action of the Committee in refusing to certify Anastaplo as fit for admission to the Bar must be considered. The majority of the Committee rationalized its position on the ground that without answers to some of the questions it had asked, it could not conscientiously perform its duty of determining Anastaplo's character and fitness to be a lawyer. A minority of the Committee described this explanation as "pure sophistry." And it is simply impossible to read this record without agreeing with the minority. For, it is difficult to see what possible relevancy answers to the questions could have had in the minds of these members of the Committee after they had received such completely overwhelming proof beyond a reasonable doubt of Anastaplo's good character and staunch patriotism. I can think of no sound reason for further insistence upon these answers other than the

very questionable, but very human, feeling that this young man should not be permitted to resist the Committee's demands without being compelled to suffer for it in some way.

It is intimated that the Committee's feeling of resentment might be assuaged and that Anastaplo might even be admitted to the Bar if he would only give in to the demands of the Committee and add the requested test oath to the already overwhelming proof he has submitted to establish his good character and patriotism. In this connection, the Court says: "We find nothing to suggest that he would not be admitted now if he decides to answer, assuming of course that no grounds justifying his exclusion from practice resulted. In short, petitioner holds the key to admission in his own hands." However well this familiar phrase may fit other cases, it does not fit this one. For the attitude of the Committee, as revealed by the transcript of its hearings, does not support a belief that Anastaplo can gain admission to the Illinois Bar merely by answering the Committee's questions, whatever answers he should give. Indeed, the Committee's own majority report discloses that Anastaplo's belief in the "right of revolution" was regarded as raising "a serious question" in the minds of a majority of the Committee with regard to his fitness to practice law and that "certain" members of that majority (how many, we cannot know) have already stated categorically that they will not vote to admit an applicant who expresses such views. Nor does the opinion of the Illinois Supreme Court indicate that Anastaplo "holds the key to admission in his own hands." Quite the contrary; that court's opinion evidences an almost insuperable reluctance to upset the findings of the Committee. Certainly, that opinion contains nothing that even vaguely resembles the sort of implicit promise that would justify the belief asserted by the majority here. And, finally, I see nothing in the

majority opinion of this Court, nor in the majority opinions in the companion cases decided today, that would justify a belief that this Court would unlock the door that blocks his admission to the Illinois Bar if Anastaplo produced the "key" and the state authorities refused to use it.

The opinion of the majority already recognizes that there is not one scrap of evidence in the record before us "which could properly be considered as reflecting adversely upon his [Anastaplo's] character or reputation or on the sincerity of the beliefs he espoused before the Committee," and that the Committee had not received " 'any information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group.' " The majority opinion even concedes that Anastaplo was correct in urging that the questions asked by the Committee impinged upon the freedoms of speech and association guaranteed by the First and Fourteenth Amendments. But, the opinion then goes on to hold that Anastaplo can nonetheless be excluded from the Bar pursuant to "the State's interest in having lawyers who are devoted to the law in its broadest sense. . . ." [6] I cannot regard that holding, as applied to a man like Anastaplo, as in any way justified. Consider it, for example, in the context of the following remarks of Anastaplo to the Committee—remarks the sincerity of which the majority does not deny:

> "I speak of a need to remind the bar of its traditions and to keep alive the spirit of dignified but determined advocacy and opposition. This is not only for the good of the bar, of course, but also because of what the bar means to American republican government.

[6] *Konigsberg* v. *State Bar of California*, decided today, *ante*, p. —, —, which the majority here relies upon as also having settled the issue in this case.

> The bar when it exercises self-control is in a peculiar position to mediate between popular passions and informed and principled men, thereby upholding republican government. Unless there is this mediation, intelligent and responsible government is unlikely. The bar, furthermore, is in a peculiar position to apply to our daily lives the constitutional principles which nourish for this country its inner life. Unless there is this nourishment, a just and humane people is impossible. The bar is, in short, in a position to train and lead by precept and example the American people."[5]

These are not the words of a man who lacks devotion to "the law in its broadest sense."

The majority, apparently considering this fact irrelevant because the State might *possibly* have an interest in learning more about its Bar applicants, decides that Anastaplo can properly be denied admission to the Bar by purporting to "balance" the interest of the State of Illinois in "having lawyers who are devoted to the law in the broadest sense" against the interest of Anastaplo and the public in protecting the freedoms of the First Amendment, concluding, as it usually does when it engages in this process, that "on balance" the interest of Illinois must prevail.[6] If I had ever doubted that

---

[5] These remarks were made by Anastaplo in his closing argument before the Committee. He also introduced evidence to the Committee that he had earlier expressed similar views in a book review published in 1954. See Anastaplo, Review: Drinker, Legal Ethics, 14 Law. Guild Rev. 144.

[6] I think the majority has once again misapplied its own "balancing test," for the interests it purports to "balance" are no more at stake here than in *Konigsberg*. Moreover, it seems clear to me that Illinois, like California, is placing the burden of proof upon applicants for the Bar to prove they do not advocate the overthrow of the government. Thus the decision here, like that in *Konigsberg*, is contrary to *Speiser* v. *Randall*, 357 U. S. 513.

the "balancing test" comes close to being a doctrine of governmental absolutism—that to "balance" an interest in individual liberty means almost inevitably to destroy that liberty—those doubts would have been dissipated by this case. For this so-called "balancing test"—which, as applied to the First Amendment, means that the freedoms of speech, press, assembly, religion and petition can be repressed whenever there is a sufficient governmental interest in doing so—here proves pitifully and pathetically inadequate to cope with an invasion of individual liberty so plainly unjustified that even the majority apparently feels compelled expressly to disclaim "any view upon the wisdom of the State's action."

I, of course, wholeheartedly agree with the statement of the majority that this Court should not, merely on the ground that such action is unwise, interfere with governmental action that is within the constitutional powers of that government. But I am no less certain that this Court should not permit governmental action that plainly abridges constitutionally protected rights of the People merely because a majority believes that on "balance" it is better, or "wiser," to abridge those rights than to leave them free. The inherent vice of the "balancing test" is that it purports to do just that. In the context of its reliance upon the "balancing test," the Court's disclaimer of "any view upon the wisdom of the State's action" here thus seems to me to be wholly inconsistent with the only ground upon which it has decided this case.

Nor can the majority escape from this inconsistency on the ground that the "balancing test" deals only with the question of the importance of the existence of governmental power as a general matter without regard to the importance of its exercise in a particular case. For in *Barenblatt* v. *United States* the same majority made it clear that the "balancing test" is to be applied to the facts of each particular case: "Where First Amendment rights

are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake *in the particular circumstances shown.*" [9] (Emphasis supplied.) Thus the Court not only "balances" the respective values of two competing policies as a general matter, but also "balances" the wisdom of those policies in "the particular circumstances shown." Thus, the Court has reserved to itself the power to permit or deny abridgment of First Amendment freedoms according to its own view of whether repression or freedom is the wiser governmental policy under the circumstances of each case.

The effect of the Court's "balancing" here is that any State may now reject an applicant for admission to the Bar if he believes in the Declaration of Independence as strongly as Anastaplo and if he is willing to sacrifice his career and his means of livelihood in defense of the freedoms of the First Amendment. But the men who founded this country and wrote our Bill of Rights were strangers neither to a belief in the "right of revolution" nor to the urgency of the need to be free from the control of government with regard to political beliefs and associations. Thomas Jefferson was not disclaiming a belief in the "right of revolution" when he wrote the Declaration of Independence. And Patrick Henry was certainly not disclaiming such a belief when he declared in impassioned words that have come on down through the years: "Give me liberty or give me death." This country's freedom was won by men who, whether they believed in it or not, certainly practiced revolution in the Revolutionary War.

---

[9] 360 U. S. 109, 126. The majority in *Barenblatt* then proceeded to "balance" those interests on the basis of the particular record of that case. *Id.*, at 127–134.

Since the beginning of history there have been governments that have engaged in practices against the people so bad, so cruel, so unjust and so destructive of the individual dignity of men and women that the "right of revolution" was all the people had left to free themselves. As simple illustrations, one government almost 2,000 years ago burned Christians upon fiery crosses and another government, during this very century, burned Jews in crematories. I venture the suggestion that there are countless multitudes in this country, and all over the world, who would join Anastaplo's belief in the right of the people to resist by force tyrannical governments like those.

In saying what I have, it is to be borne in mind that Anastaplo has not indicated, even remotely, a belief that this country is an oppressive one in which the "right of revolution" should be exercised.[10] Quite the contrary, the entire course of his life, as disclosed by the record, has been one of devotion and service to his country—first, in his willingness to defend its security at the risk of his own life in time of war and, later, in his willingness to defend its freedoms at the risk of his professional career in time of peace. The one and only time in which he has come into conflict with the Government is when he refused to answer the questions put to him by the Committee about

[10] Anastaplo's belief in the "right of revolution," as disclosed in this record, is no different from that expressed by Professor Chafee: "Most of us believe that our Constitution makes it possible to change all bad laws through political action. We ought to disagree vehemently with those who urge violent methods, and whenever necessary take energetic steps to prevent them from putting such methods into execution. This is a very different matter from holding that all discussion of the desirability of resorting to violence for political purposes should be ruthlessly stamped out. There is not one among us who would not join a revolution if the reason for it be made strong enough." Chafee, Free Speech in the United States 178 (Harvard University Press, 1942).

his beliefs and associations. And I think the record clearly shows that conflict resulted, not from any fear on Anastaplo's part to divulge his own political activities, but from a sincere, and in my judgment correct, conviction that the preservation of this country's freedom depends upon adherence to our Bill of Rights. The very most that can fairly be said against Anastaplo's position in this entire matter is that he took too much of the responsibility of preserving that freedom upon himself.

This case illustrates to me the serious consequences to the Bar itself of not affording the full protections of the First Amendment to its applicants for admission. For this record shows that Anastaplo has many of the qualities that are needed in the American Bar.[11] It shows, not only that Anastaplo has followed a high moral, ethical and patriotic course in all of the activities of his life, but also that he combines these more common virtues with the uncommon virtue of courage to stand by his principles at any cost. It is such men as these who have most greatly honored the profession of the law—men like Malsherbes, who, at the cost of his own life and the lives of his family, sprang unafraid to the defense of Louis XVI against the fanatical leaders of the Revolutionary government of France[12]—men like Charles Evans Hughes, Sr., later Mr.

---

[11] For a similar case, see *In re Summers*, 325 U. S. 561, in which a 5–4 majority of this Court upheld an informal order of the Illinois Supreme Court denying Bar admission to Clyde W. Summers on the ground that his religious beliefs were inconsistent with the Illinois Constitution.

[12] At the time of his decision to volunteer his services in defense of Louis XVI, Malsherbes, a man of more than seventy, was apparently completely safe from the post-revolutionary blood bath which then enveloped France. For, although active in public life prior to the Revolution, he had always been a friend of the people and, in any case, he had largely passed out of the public mind with his retirement some years earlier. Within a year of his unsuccessful defense of the

Chief Justice Hughes, who stood up for the constitutional rights of socialists to be socialists and public officials despite the threats and clamorous protests of self-proclaimed super patriots [13]—men like Charles Evans Hughes, Jr., and John W. Davis, who, while against everything for which the Communists stood, strongly advised the Congress in 1948 that it would be unconstitutional to pass the law then proposed to outlaw the Communist Party [14]—men like Lord Erskine, James Otis, Clarence Darrow, and the multitudes of others who have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it.

But that is the present trend, not only in the legal profession but in almost every walk of life. Too many men are being driven to become government-fearing and time-serving because the government is being permitted to strike out at those who are fearless enough to think as they

---

life of France's former king, however, he, together with his entire family, were convicted by a revolutionary tribunal on the vague charge of conspiracy against "the safety of the State and the unity of the Republic." Malsherbes was then taken to the guillotine where, after being forced to witness the beheading of the other members of his family, he paid with his life for his courage as a lawyer. This story has been interestingly told by John W. Davis. See Davis, The Lawyers of Louis XVI, in The Lawyer, April 1942, p. 5, at 6–13.

[13] The story of Hughes' participation in the fight against the action of the New York Legislature in suspending five of its members in 1920 on the ground that they were socialists is told in John Lord O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592, 593–594.

[14] See *Barenblatt* v. *United States*, 360 U. S. 109, 147–148 (dissenting opinion).

please and say what they think.[15] This trend must be halted if we are to keep faith with the Founders of our Nation and pass on to future generations of Americans the great heritage of freedom which they sacrificed so much to leave to us. The choice is clear to me. If we are to pass on that great heritage of freedom, we must return to the original language of the Bill of Rights. We must not be afraid to be free.

---

[15] See, *e. g.*, *Barsky* v. *Board of Regents*, 347 U. S. 442; *Uphaus* v. *Wyman*, 360 U. S. 72; *Barenblatt* v. *United States*, 360 U. S. 109; *Uphaus* v. *Wyman*, 364 U. S. 388; *Wilkinson* v. *United States*, 365 U. S. 399; *Braden* v. *United States*, 365 U. S. 431; *Konigsberg* v. *State Bar of California*, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 58.—October Term, 1960.

In re George Anastaplo, Petitioner. | On Writ of Certiorari to the Supreme Court of Illinois.

[April 24, 1961.]

Mr. Justice Brennan, with whom The Chief Justice joins, dissenting.

I join Mr. Justice Black's dissent. I add only that I think the judgment must also be reversed on the authority of *Speiser* v. *Randall*, 357 U. S. 513, for the reasons expressed in my dissent in *Konigsberg* v. *State Bar of California*.